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In The

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 372

In the Matter of Proving the Last Will and Testament of
HENRY ALTMAYER,
Deceased,

as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,
Petitioner,

—vs.—

BEATRICE ALTMAYER RODNEY,
Respondent,

—*and*—

DONALD T. MULLANE,
Special Guardian.

## PETITION FOR WRIT OF CERTIORARI TO SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK AND SUPPORTING BRIEF

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## *PETITION FOR WRIT OF CERTIORARI TO SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK*

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioner respectfully shows to this Honorable Court:

### *Summary Statement of the Matter Involved.*

This is a petition for a writ of certiorari to review a judgment of the New York Court of Appeals embodied in the remittitur and decree entered thereon. An order on rehearing denied petitioner's motion for reargument and to amend the remittitur to recite constitutional questions raised.

In the contested probate proceeding below, petitioner propounded a copy of the last will and testament of Henry Altmayer deceased dated May 1, 1937. The Surrogate held that "The presumption of destruction *animo revocandi* attaches to the instrument of 1937 by reason of its nonproduction since the original was delivered to deceased." (R. 271), and denied probate. The Appellate Division reversed and admitted the will, holding that "the contestant claimed an intestacy by reason of the revocation of the will. The question was presented by contestant's claim that in 1939, in her presence, and in the presence of the witness Kelekian, the testator had destroyed the original will with the intent of revoking it" (R. 354). The Court of Appeals reversed, and affirmed the Surrogate's decree, "upon the ground that the findings of the Surrogate are in accordance with the weight of the evidence" (R. 359 ).

The proponent (petitioner here) offered the copy of the will and claimed the original was fraudulently destroyed during the lifetime of deceased or after his death (R. 12). The contestant came forward and explained proponent's nonproduction of the original will by showing its actual destruction by tearing, in 1939, in her presence and that of a witness. She pleaded revocation (Answer, par. "SECOND", R. 24). The defense of revocation was one of confession and avoidance; confession of the physical destruction of the will, and avoidance of the fraud by pleading and offering proof that decedent destroyed it by tearing, thereby revoking it. Both the Surrogate and the Court of Appeals were silent as to revocation.

The federal question involves a denial of due process of law in giving judgment on a defense other than that pleaded and proved. The relief granted contestant was not within the grounds relied on by her to obtain it. The case was tried on the issue of revocation and judgment given on presumed destruction animo revocandi, the latter having been neither

pleaded nor proved in the case. The principal ground relied on below and here by petitioner is that one may not go to trial on one defense and sustain judgment in his favor upon another, consistent with the due process clause of the 14th Amendment. The defense sustained must be in accordance with the allegations and the proofs. Due process requires that the pleadings notify the parties of the grounds upon which a defense is based and where the judgment is not responsive to the issues heard, petitioner is denied the benefit of his constitutional right to notice in that due process in its primary sense requires an opportunity to be heard. The right to such a hearing is one of the rudiments of fair play assured to every litigant by the 14th Amendment as a minimal requirement.

The doctrine of implied revocation does not exist in New York since the enactment of Section 34 of the New York Decedent Estate Law, which requires, in pertinent part, an actual physical tearing or destruction of the will "with the intent and for the purpose of revoking the same." As opposed to the *actual* physical destruction required by the statute, there exists in New York a *presumed* destruction animo revocandi. The presumption of destruction obtains only in cases where the will cannot be found after death, and arises from the fact that the will could not be found. *Schultz* v. *Schultz,* 35 N. Y. 653, 654.

It was neither pleaded nor proved that the will could not be found. There is no evidence in the record that the will could not be found after death. Both parties claimed actual destruction as distinguished from presumed destruction. The defense of revocation, as above stated, confessed the actual destruction but avoided the imputation of fraud by the pleading and proof of physical destruction by the testator himself.

No notice was ever given of any claim that after a search the will could not be found. The petitioner having thus

been deprived of notice to which he was constitutionally entitled had no opportunity to defend against such claim. The *fact in issue* in cases of presumed destruction is whether the will could not be found. The *fact in issue* in a case of revocation by physical destruction is whether the will was actually destroyed by testator, and the issue of law is whether the facts and circumstances surrounding the destruction establish the concurrent intent to revoke required by the Statute (Decedent Estate Law sec. 34). *Re White,* 106 Misc. 210.

In this case there was no claim that because the will could not be found, no one knew what had become of it. The contestant came forward in her pleading and proof and told what became of it. She said it was destroyed. The issue tendered, then, was whether the destruction worked a revocation satisfactory to the statute.

Moreover, the Court of Appeals reversed the finding of fact made by the Appellate Division "that the original of said will was not destroyed by decedent" (R. 282), thereby holding that the will *was* destroyed by decedent. Since the will was destroyed and it is stipulated that the will was a valid and duly executed will (R. 260) it follows as a matter of fact and of law, that the will was in existence up to the time the Court of Appeals found that the decedent destroyed it, because the decedent could not have destroyed the will unless it was physically in existence at the time he tore and destroyed it.

The controversy therefore concerned a will which was in existence up to the time it was destroyed, and not a will which could not be found.

The second federal question, involving equality of treatment under the equal protection clause of the 14th amendment, arises out of the refusal of the court below, in the face of the petition for rehearing which sharply brought the omission to its attention, to decide the question of law as to revocation presented upon the appeal without which the

litigation could not be *judicially* determined. The court below was under the positive duty and express mandate of the organic law; namely, the state constitution, to review such question of law, where the sole question of law, determinative of the litigation, was presented. The court below could not, consistant with the 14th amendment, assume jurisdiction, entertain the appeal and then omit and refuse to determine such question so presented.

The primary duty of the court below since the time of its creation was to review questions of law, to make uniform the law "for litigants and for all people." Instead of uniformity, it created the startling and anomalous precedent under which administration co-exists with the existence of a will (stipulated valid) which has never been declared revoked, thereby engendering confusion in the administration of decedent's estates, despite the supposed safeguard of section 34 of the Decedent Estate Law.

Every executor is accorded by statute the right to have his testator's will, which has been torn or destroyed, tested by the requirements of Section 34 of the Decedent Estate Law to determine whether the tearing worked a revocation. Petitioner was denied that right enjoyed by all others.

"It would be a curious and novel probate proceeding in which a Surrogate refused to consider at any stage evidence of revocation of a paper propounded" (*White's Will*, 106 Misc. 210, 174 N. Y. S. 424).

There was not alone a denial of justice but the court below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

At the time of the appeal to the Court of Appeals there was an existing decree on remittitur of the Appellate Division admitting the will to probate. The federal question arose from the unanticipated disposition of the case at the close of proceedings upon the appeal in the Court of Ap-

peals. The first opportunity presented to petitioner to raise the federal questions was upon a rehearing.

On rehearing, petitioner specifically and categorically raised the federal questions of due process and equal treatment in his notice of motion (R.360) and in addition thereto as follows:

> "The failure of the Court of Appeals to determine such questions of law, and its failure to discharge its primary function and duty denies to respondents the equal protection of the laws of this state. It denies and abridges the rights, privileges and immunities and the due process of the law secured to respondents by Section 1 of the Fourteenth Amendment of the Constitution of the United States and by Article 1 sections 1 and 6 of the Constitution of the State of New York * * *. The issue presented by the pleadings and proof in all Courts, was whether there was a valid revocation of the will within the requirements of the statute. While the Surrogate was silent as to revocation, and made neither findings of fact nor conclusions of law in that regard, the Appellate Division held as a matter of law that the issue presented was one of revocation. * * * Since none of the parties pleaded or proved that the will could not be found, but the proof of both sides established actual as distinguished from presumed, destruction of the will, the finding of the Surrogate, as concurred in by the Court of Appeals, is not determinative of the issue presented, and there has been thus left open the determinative question of law as to whether or not, upon the proof, the destruction of the will worked a revocation within the requirements of the statute. * * * Proponent requests that the remittitur be recalled and amended so as to recite the constitution questions set forth in the notice of motion and raised in consequence

of the action heretofore taken by the court in disposing of the cause on the appeal, to the end that an adverse decision on this motion may be reviewed on Certiorari in the Supreme Court of the United States." (Brief on Rehearing, p. 12, 20, 22, 25-26).

***Facts.***

Briefly stated, the facts are as follows: Henry Altmayer, the testator, executed his will at proponent's (petitioner's) office on May 1, 1937, in the presence of contestant and three witnesses (R. 42). At the time, petitioner, who was nominated an executor and trustee thereunder, conformed a carbon copy to the original and retained the office copy (R. 43, 44). There was no other will or codicil (R. 260). The estate amounts to $300,000 in cash and securities. The will gave minor legacies to the testator's niece, his sister, and to a charitable institution. In chief, ⅓ or about $100,000.00 is bequeathed to petitioner, as one of the trustees, in trust, with income payable to contestant's daughter, then age 11, principal to be paid her at age 28, and ⅔ outright to contestant (R. 17-23). The executor is to run decedent's business.

Decedent died February 1, 1944, at age 76. He was bedridden for 6 months prior to death, during which time contestant controlled his business and had sole access to his vault (R. 113, 261). Some three weeks before death, on January 6, 1944, contestant called at proponent's office and told him she had just come from her father's vault, where she had been checking his securities, that she had seen the will there but had not read it carefully, and asked to see proponent's copy, which he showed her (R. 57-58, 120, 146). She asked if a copy could be used if the original were not produced (R. 59) and was informed that it could be if there were no objections. Proponent and his wife were close friends of contestant and they visited each other frequently

(R. 48). A cordial relationship existed between proponent and decedent (R. 46-47). The day after death he met contestant at the funeral parlors and told her it would be necessary to prepare probate papers. She said she would be down to his office in a few days to attend to the matter (R. 62). Subsequently, at proponent's request she gave him information for preparation of a petition to probate the will (R. 63). She never at any time told him that the will had been destroyed or revoked (R. 292), not even when he told her that he was preparing a petition for an order to open the vault to obtain the will (R. 148).

On February 11, 1944, she quietly commenced an administration proceeding in which she asserted she knew of no will and could find none. On learning of the administration proceeding, proponent notified the Surrogate that testator had executed a will in the presence of Mrs. Rodney who was then applying for letters of administration by a petition which stated she had no knowledge of any will of the decedent. The administration proceeding was thereupon promptly arrested by the Surrogate, and proponent commenced an abortive separate proceeding against her to compel production of the original will. Thereafter, proponent commenced the present probate proceeding and offered the conformed copy. The probate proceeding is separate and independent from the proceeding to compel production of the will and from the arrested administration proceeding. In this probate proceeding she did not claim the will could not be found, but pleaded and gave testimony of revocation. Her deposition in the proceeding to compel production of the will was received in the probate proceeding under stipulation (R. 259, 262). She testified she read the conformed copy at proponent's office in January 1944 (120, 146); that she knew of only one will, the propounded will (R. 131) and was present when it was executed (R. 119). *She did not look for the will in the vault after death* (292), but looked for the

will at decedent's apartment, and at his place of business (R. 144-5) and employed the assistance of decedent's nurses (R. 149) and of her attorney, Mr. Feinberg, in the search (R. 149) and her attorney made an independent search (R. 266), and that the last time she saw the will was when it was destroyed by decedent in 1939 in her presence and in the presence of one Kelekian (R. 340). In short, she employed the assistance of her attorney and of decedent's nurses in her search for testator's only will which she claims was destroyed in her presence five years previous to the search.

Her attorney's independent search raised the question whether Mrs. Rodney had informed him of the destruction. If she informed him, then he not alone assisted her in her search but made an independent search for the will which both he and contestant knew did not exist because it had been destroyed in her presence. If she did not inform him, she suppressed from her own attorney the most vital factor in the litigation, namely her explanation of what became of the will at decedent's death at a time when she had sole access to the vault where it was deposited. When proponent asked her if the will was in the vault, she answered "Ask me no questions and I will tell you no lies" (363). Mrs. Rodney filed an answer to the petition in the probate proceeding in which she pleaded "That the said paper is not the last will and testament of decedent, in that it was during his lifetime duly revoked by him", and thereby issue was joined as to revocation of the will. She could have consented to probate, but elected instead to contest the minor bequests and the bequest to her daughter.

The good faith of proponent in the proceeding has been repeatedly adjudicated by the Surrogate in his decisions on related proceedings in the litigation. In contrast the Surrogate regarded her with suspicion and stated that her speech and conduct "leave her open to grave suspicion" (R. 271). The Court of Appeals confirmed the Surrogate's findings.

Nevertheless, decedent's will, stipulated valid, and never revoked, has been denied probate, and contestant, whose conduct in connection with the will has been judicially declared to leave her open to grave suspicion, has been permitted to establish intestacy under which she is sole distributee.

### *Jurisdiction.*

1. January 18, 1946 is the date of the judgment (remittitur of the Court of Appeals) and March 23, 1946 is the date of the decree entered on the remittitur to be reviewed. Application for reargument (rehearing) was duly filed April 8, 1946 and denied April 18, 1946.

2. The statute under which jurisdiction is invoked is sec. 344(b) of the United States Code (Judicial Code Sec. 237, amended).

3. Jurisdiction attaches and certiorari lies within the rule enunciated and applied by this Court in the following cases:

*Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 287;
*Brinckerhoff-Fariss Co.* v. *Hill,* 281 U. S. 673, 678;
*Reynolds* v. *Stockton,* 140 U. S. 254, 264, 265;
*Windsor* v. *McVeigh,* 93 U. S. 274, 282;
*Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 426;
*Washington Railroad* v. *Bradleys,* 77 U. S. (10 Wall) 299, 303;
*Horey* v. *Elliott,* 167 U. S. 409, 446.

### *Questions Presented.*

I. (a) Was it a denial of due process of law for the Court below to give judgment on a defense other than that pleaded and proved?

(b) Was there a denial of fair play and due process of law for the Court below to grant contestant relief which was not within the grounds relied on by her to obtain it?

(c) May a litigant, consistent with the due process clause of the 14th amendment, go to trial on one defense and sustain judgment in her favor upon another where the defense sustained is not in accordance with the allegations and the proofs?

(d) Was petitioner deprived of his constitutional right to notice and the opportunity to defend where neither the pleadings nor the proof raised the defense upon which judgment was given?

(e) Did the court below have jurisdiction to give judgment upon presumed destruction animo revocandi where there was no claim that the will could not be found and no evidence to support a finding that the will could not be found?

II. (a) Was petitioner denied the equal protection of the law where the court below omitted and refused to decide the only and determinative question of law presented when the court is under the duty and the mandate of the State Constitution to decide such questions of law?

(b) Once the Court of Appeals reverses a finding of fact that "the original of said will was not destroyed by decedent" thereby holding that he did destroy it, could the Court, consistent with the equal protection clause of the 14th amendment, omit and refuse to decide the question of law thereby presented as to whether such destruction worked a revocation within the requirements of Decedent Estate Law section 34?

III. Was there a departure from the usual course of judicial proceedings such as to require the supervision of this Court?

IV. May this Court review the findings of fact.

### *Reasons Relied Upon for the Allowance of the Writ.*

1. The relief granted contestant was not within the grounds relied on by her to obtain it; it was not responsive to the issue tendered nor was it in accordance with the allegations and the proofs. There was neither notice to petitioner nor opportunity to be heard. As such it was a denial of fair play and a departure from the usual and accepted course of legal procedure.

2. The decision of the Court of Appeals in giving judgment on a defense other than that pleaded and proved is in conflict with the applicable decisions of this Court, of the Federal courts and of the New York courts.

3. The decision of the Court of Appeals exceeded its jurisdiction and its refusal to decide the question of law as to revocation, even after rehearing, was arbitrary and constituted a denial of justice.

4. The presumption of destruction animo revocandi arises from the fact that the will could not be found and there is no evidence to sustain a finding that the will could not be found.

5. There is a question of public importance in that the Court of Appeals, in the place of uniformity and settled law, has injected confusion into the administration of decedent's estates in that some decedents are accorded the benefits of the statute on revocation and others are denied it, under this precedent where administration co-exists with the existence of an unrevoked valid will. As to some litigants the statute is indiscriminately abrogated.

### *Prayer for Writ.*

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this

Honorable Court directed to the Surrogate's Court, New York County, State of New York, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings had in this case, to the end that this cause may be reviewed and determined by this Honorable Court; that the judgment and decree on remittitur of the Court of Appeals be reversed and the resettled order of the Appellate Division dated the 4th day of October 1945 be affirmed; and that the petitioner be granted such other different and additional relief as may seem proper.

Dated: New York,
July, 1946.

EDWIN B. WOLCHOK,
Counsel for Petitioner.

LAWRENCE S. TIMEN,
*Of Counsel.*

In The

# Supreme Court of the United States

October Term, 1946

No.

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In the Matter of Proving the Last Will and Testament of

Henry Altmayer,

Deceased,

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Emil H. Wasserberger,

Petitioner,

*—vs.—*

Beatrice Altmayer Rodney,

Respondent,

*—and—*

Donald T. Mullane,

Special Guardian.

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## *BRIEF IN SUPPORT OF PETITION*

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### *Statement.*

The facts, so far as this application is concerned, are sufficiently in the petition. The grounds upon which jurisdiction is invoked, the claims advanced, the rulings made

and the cases believed to sustain jurisdiction, are likewise set forth at length in the petition.

### *Opinions Below.*

The opinion of the Surrogate is not officially reported but appears in full in the record (R. 271). The opinion of the Appellate Division of the Supreme Court is officially reported in 269 App. Div. 837, 56 N. Y. S. 2d 101 and appears in the record (R. 354). The opinion of the Court of Appeals is officially reported in 295 N. Y. 693, 65 N. E. 2d, 333. The opinion of the Court of Appeals on rehearing is officially reported in 295 N. Y. 894, 67 N. E. 2d 525 and is incorporated in full in the Remittitur, printed in the record (R. 359 ).

### *Relevant Provisions of Statute Involved.*

Decedent Estate Law, section 34. Revocation and cancellation of written wills.

> No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

## *Specification of Errors.*

The Court of Appeals erred as follows:

1. In giving judgment on a defense other than that pleaded and proved.

2. The relief granted contestant was not within the grounds relied on by her to obtain it in that judgment was given upon implied destruction animo revocandi whereas the pleading and proof of contestant was revocation and she relied upon an actual physical destruction by tearing as effecting a revocation within the requirements of Decedent Estate Law, sec.34.

3. The defense sustained was not in accordance with the allegations and the proofs.

4. There was no notice given petitioner of any claim that the will could not be found, and the court thus denied petitioner fair play and an opportunity to be heard.

5. The doctrine of implied revocation does not exist in New York since the enactment of Decedent Estate Law, sec. 34.

6. The presumption of destruction animo revocandi arises from the fact that a will cannot be found, and there is no evidence to support a finding that the will could not be found.

7. Once the Court of Appeals reversed the 4th finding of fact of the Appellate Division that "the original of said will was not destroyed by decedent" thereby holding that decedent *did* destroy his will, the court was under the express and positive duty to decide the question of law presented as to

whether such destruction worked a revocation satisfactory to the statute. The court could not be silent as to revocation and could not affirm the Surrogate's decree which was also silent as to revocation without denying petitioner equality of treatment.

## *ARGUMENT*

### POINT I.

**The decision of the Court of Appeals in giving judgment upon a defense other than that relied upon in the pleadings and proof is in conflict with the applicable decision of this Court.**

The burden of this point is that it was a denial of due process of law to grant contestant relief which was not within the grounds relied on by her to obtain it and which was not responsive to the issue tendered and heard.

### *The Issue Below.*

The issue of revocation was squarely tendered. In answer to petitioner's claim that the will was fraudulently destroyed (R. 12) the contestant pleaded revocation (R. 24):

> "That the said paper is not the last will and testament of Decedent, in that it was during his lifetime duly revoked by him."

and her proof was that the revocation was effected by a physical destruction by tearing of the will. She testified to the tearing (R. 340, 350) and gave supporting proof thereof by the witness Kelekian (R. 178, 215-216).

The defense of revocation was confession and avoidance of petitioner's claim of fraudulent destruction, admitting

the destruction but avoiding the fraud by the plea and proof that testator tore the will with intent to revoke it.

Contestant testified she knew of only one will (R. 131). The stipulation (R. 260) admits that the will is a valid will, duly executed by a competent testator and that there is no codicil nor any other will of the testator (R. 260).

"In every instance there is a *prima facie* presumption that a testamentary disposition once made, or a testamentary intent once entertained, continues until the contrary is shown." *Re Crouse's Will,* 205 App. Div. 135, 199 N. Y. Supp. 833, 839.

Since, apart from that presumption, the answer sets up revocation, and contestant offered proof of destruction by tearing in 1939 (R. 178), it follows from the stipulation that testator's only will is conceded to be valid and in existence up to the time of the destruction claimed.

Therefore the only question before the Court was whether such destruction by tearing constituted a revocation of the will within the requirements of the statute (Decedent Estate Law, Sec. 34).

### *Effect of Decisions Below.*

The Surrogate was silent as to revocation. He held that "the presumption of destruction *animo revocandi* attaches to the instrument of 1937 by reason of its non-production, since the original was delivered to deceased" (R. 271).

The Appellate Division, however, was articulate on the subject and defined the issue by stating the nature of contestant's claim, declaring (R. 354):

> "The contestant claims an intestacy *by reason of the revocation* of the will. The question was presented by contestant's claim that in 1939, in her presence and in the presence of the witness Kelekian, the testator had

> destroyed the original will with the intent of revoking it." (Italics ours.)

and admitted the will to probate. With the issue thus defined and judicially settled, petitioner had no occasion to anticipate that the Court of Appeals would dispose of the appeal by sustaining a defense neither pleaded nor proved, upon grounds not relied upon by contestant to obtain the relief granted. Nevertheless, the Court of Appeals reversed:

> "upon the ground that the findings of the Surrogate were in accordance with the weight of the evidence"

and thereby, the Court of Appeals not alone disregarded and was silent on the issue of revocation, but affirmed the Surrogate's decision that the "presumption of destruction *animo revocandi* attached to the instrument of 1937".

But the presumption of destruction *animo revocandi* obtains only in cases where a will, proved to exist, cannot be found after death of the testator, and that presumption arises from the fact that the will could not be found. Thus, in *Schultz* v. *Schultz,* 35 N. Y. 653, 654, the Court said:

> "If the will had remained in the custody of the testator, or it had appeared that after its execution he had access to it, the presumption of law would be, *from the fact that it could not be found after his decease*, that the same had been destroyed by him animo revocandi." (Italics ours.)

The record shows that there was no issue in the pleadings or proof that the will could not be found. Indeed, contestant's concession (R. 292) would exclude it. There was no claim made in this case that the will could not be found, nor did the contestant in her pleading or upon the trial give any notice of any such claim.

So that when the Court below, which was silent as to revocation, affirmed the Surrogate's decree "on the ground that the Surrogate's findings are in accordance with the weight of the evidence", and the Surrogate (who was likewise silent as to revocation) found that "the presumption of destruction animo revocandi attaches to the instrument of 1937," judgment was given upon a finding devoid of any evidence to support it, and upon an issue neither pleaded nor proved, and of which no notice was given, and which was not within the grounds relied on by contestant.

Having in mind that the doctrine of implied revocation does not exist in the State of New York since the enactment of Decedent Estate Law, sec. 34 *Crounse's Will,* 168 Misc. 359, 6 N. Y. S. 2d 32, 35; *Mortensen's Will,* 157 Misc. 717, 284 N. Y. S. 420, 425), and having in mind that "all presumptions of law in favor of a party must be consistent with his allegations. None will be indulged for his benefit in opposition to them" (*Andrews* v. *Chadbourne,* 19 Barb 147) and also that even if she properly had the benefit of the presumption it merged in her proof of destruction (*U. S. Trust Co.* v. *Frelinghuysen,* 262 App. Div. 259, 28 N. Y. S. 2d, 448, 450) it remains to inquire whether the Court below, in giving judgment not responsive to the issue tendered, deprived petitioner of due process of law and whether the decision below is in conflict with the decisions of this Court.

### *Decisions of This Court.*

This Court has repeatedly held that where the judgment is not responsive to the issue tendered and where there is no notice, there is a denial of due process and the judgment is void. In *Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 281, this Court declared:

> "The Federal question is whether, in that Court, with such jurisdiction, the defendants were denied due process of law. Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that *the notice and the hearing should correspond*, and that the relief granted should be appropriate to that which had been heard and determined *on such notice*. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based." (Italics ours)

At page 287 of the *Standard Oil* case the Court further said that such a judgment in effect deprives the party of the benefit of his constitutional right to notice.

The question here presented is pointed-up in the most forceful language in the case of *Reynolds* v. *Stockton,* 140 U. S. 254, 264, 265, 269, 270, where the Court defined the fundamental principles involved as follows:

> "And without amendment of the pleadings, a judgment for the recovery of the possession of real property, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made on the defendant. The invalidity of the judgment depends on the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted."

This Court in the *Reynolds* case also quoted with approval the decision in a New Jersey case that "a judgment upon a

matter outside the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard." In concluding its opinion, this Court there observed that the relief sought was the subjection of a fund to certain claims, and then remarked: "No valid judgment could, therefore, be rendered therein which went beyond the subjection of this fund to those claims."

This Court enunciated the same principles in the earlier case of *Windsor* v. *McVeigh*, 93 U. S. 274, 282, where it was said that in cases where judgments were not within the relief sought, the judgments "would not merely be erroneous: they would be absolutely void; because the court rendering them would transcend the limits of its authority".

Again in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 426, this Court said that to render judgment upon a matter not within the pleadings and not in fact litigated "is contrary to fundamental principles of justice."

In the case of *Washington R. R. Co.* v. *Bradleys*, 77 U. S. (10 Wall) 299, 303, this Court stated that:

> "* * * the allegations and the proofs must agree, that the Court can consider only what is put in issue by the pleadings, that averments without proof and proof without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them."

Following the decision in the *Washington R. R.* case, the Courts have uniformly declared that "the purpose of pleadings is to notify the parties of the grounds upon which a recovery is sought or a defense is based" and that the "defense sustained must be in accordance with the allegations and the proofs" (*Moffit-West Drug Co.* v. *Byrd*, 92 Fed. 290, 291) and further that "the relief granted must be

within the prayer for relief and *within the grounds alleged and relied on to obtain it.*" (*Eddy & Bissell Live Stock Co.* v. *Blackburn,* 70 Fed. 949, 954), and that one may not "go to trial upon one defense and sustain a judgment in his favor upon another and inconsistent defense", nor may he "deny in his answer the plaintiff's averments and then defeat him by a confession of the truth of those averments, and an avoidance of their effect by the proof of new matter no notice of which was given by the pleadings" (*Castle* v. *Persons,* 117 Fed. 835, 843).

These principles are deep rooted, salutary and well settled, and obtain in the forum state as well. "It is a fundamental law of pleading and of evidence that the proof must follow the allegations of the pleadings and plaintiff can only recover upon the cause of action stated in his complaint" (*Woolsey* v. *Trustees,* etc., 69 Hun 489, 23 N. Y. S. 410). In that case judgment was given for negligence on proof of a defective drain when the pleading claimed negligence in the collection of water in a hole in the sidewalk. The judgment was reversed upon the principles here in question. See also *Dewey* v. *Moyer,* 72 N. Y. 70, 77; *Reed* v. *McConnell,* 133 N. Y. 425, 429. See also *Burton* v. *Platter,* 53 F. 901.

The claim here is that there was a denial of due process in giving judgment on a defense not relied on, and on an issue not pleaded or proved. But it goes further. There was no notice, no opportunity to be heard, and a denial of fair play. In *Brinkerhoff-Farris Co.* v. *Hill,* 281 U. S. 673, 678, due process "in its primary sense" is defined as "an opportunity to be heard and to defend its substantive right."

Not only was judgment given on an issue of which no notice was given, but both the Court of Appeals and the Surrogate ignored the issue of revocation which was in fact litigated. This constitutes so far a departure from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. In *Matter of White,* 106 Misc. 210, 174 N. Y. S. 424, the Court stated:

"It would be a curious and novel probate proceeding in which a Surrogate refused to consider at any stage evidence of revocation of a paper propounded."

This is not alone a curious and novel probate proceeding, but the action of the court was such as to deprive the petitioner of fair play in its constitutional sense. As stated by the Court in *National Labor Relations Board* v. *Phelps*, 136 Fed. 2d 562, "the right to such a hearing is one of the 'rudiments of fair play' (citations) assured to every litigant by the 14th Amendment as a minimal requirement (many citations). There can be no compromise on this footing."

It was not enough that contestant's pleading and testimony as to revocation was received by the Court. The claim of revocation could not be ignored. This Court has said, in the case of *Morgan* v. *United States*, 304 U. S. 1, that: "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

The proceeding below, in short, was such as to deprive petitioner of a trial according to the accepted course of legal procedure.

Court proceedings are not merely private controversies: the public is always interested in the proper administration of justice. See *N. Y. Central R. R.* v. *Johnson*, 279 U. S. 310, 318.

It has been adequately demonstrated that the presumption of destruction *animo revocandi* arises from the fact the will could not be found (*Schultz* v. *Schultz, supra*). The Surrogate found that such presumption attached to the will although there was no evidence that the will could not be found, which could support such a finding. This is contrary to the decisions of this Court as will be observed from the

case of *Postal Telegraph Cable Co.* v. *City of Newport, Ky.*, 247 U. S. 464, where this Court said:

> "This Court will review and correct the error of a state supreme court, in assuming a state of facts without any support in the record as a basis for denying asserted federal rights."

Petitioner asserted those federal rights at the first opportunity on rehearing and a clear case exists requiring this Court to correct the error below.

Moreover, a federal right was denied, namely due process, as a result of such finding without evidence to support it; and the conclusion of law and the federal right are so closely intermingled that a decision on the federal requires a review of the findings of fact. *Fiske* v. *Kansas*, 274 U. S. 380, 385; *Creswill* v. *Grand Lodge etc.*, 225 U. S. 246, 261.

It is abundantly clear from the foregoing that the court below overstepped the bounds of its jurisdiction, and denied petitioner the due process of law secured to him by the 14th amendment, and for these reasons a review of the judgment complained of is in all respects indicated.

## POINT II.

### Petitioner was denied the equal protection of the law.

The Court of Appeals reversed the finding of fact made by the Appellate Division "that the original of said will was not destroyed by decedent" (R. 282), thereby holding that the will *was* destroyed by decedent. Since the will was destroyed and it is stipulated that the will was valid (R. 260) it follows as a matter of fact and of law that the will was in existence up to the time the Court below found that the decedent destroyed his will, because the decedent could

not have destroyed the will unless it was physically in existence at the time he tore and destroyed it.

Once the Court of Appeals holds there was a destruction of a valid will, a question of law simultaneously arises, namely: Did such destruction work a revocation of the will within the requirements of section 34 of the Decedent Estate Law which defines when and how there may be a valid revocation?

Having entertained the appeal and assumed jurisdiction thereof, the court needed to decide the issue of law thereby presented or it could not *judicially* determine the litigation. The Court of Appeals is under a positive duty and the express mandate of the organic law, namely, the state constitution, to review such question of law. The *raison d'etre,* the basic and whole function of the Court of Appeals from the time of its creation has been to review questions of law to the end that the law of the state be settled and uniform.

There could be no conclusive determination in this case in the absence of a decision of the question of law regarding revocation.

The decision of the Court of Appeals in this case has created no format which could serve as a guide in parallel litigation. On the contrary, the existence of administration with the co-existence of a valid will which has never been declared to be revoked is opposed to the statutes and the adjudicated cases. The Court of Appeals then, did not "settle the law."

No testator can be certain, in looking to the decision of the Court of Appeals in this case for authority, that he could defeat intestacy by the making and execution of a valid will.

The Court of Appeals is the creature of the Constitution of 1846. It becomes appropriate to inquire as to the reason for its creation and the nature of its jurisdiction.

In the reports of the New York State Constitutional Convention Committee, Vol. IX, the Committee at page 161 stated:

> "The jurisdiction of the Court of Appeals was given special consideration by the convention of 1894. The judiciary committee, in its report, viewed the existence of a Court of Appeals superior to the appellate tribunals, which first reviewed the decisions of the trial courts, to be occasioned by the necessary functions of settling and making certain the law not only for the litigants but for all people (Lincoln, Volume III, page 349).
>
> 'Inasmuch as the volume of business necessitates the division of the Appellate Division into four separate tribunals it is deemed necessary that there should be a superior court to settle the law. * * * It is this necessity alone which justifies the existence of a Court of Appeals superior to the appellate tribunals which first review decisions of trial courts. But for this the whole difficulty could readily be solved by abolishing the Court of Appeals and constituting strong appellate courts whose judgment should be final (Revised record Volume II, p. 893).'
>
> The Court of Appeals according to the Committee's report was to be strictly limited *to its province of reviewing questions of law* (except in capital cases) leaving the judgment of the Appellate Division upon all questions of fact * * *.
>
> (p. 179) The 1921 Convention stated it had no desire to change the *nature* of the jurisdiction of the Court of Appeals from a tribunal reviewing solely questions of law to one reviewing facts as well. * * *
>
> (p. 675) As to the jurisdiction of the Court of Appeals, the Convention has appreciated that it should

> continue to be essentially a court of law, and it has provided only two exceptions. One of these exceptions is where the judgment is of death and this exception has long existed. The other exception, which is new, but was proposed by the Constitutional Convention of 1915, has been proposed as a matter of justice within the principle of allowing a litigant at least one appeal on the facts" (Italics ours).

It is thus to be observed that before any consideration was ever given to enlarging the power of the Court of Appeals as to questions of fact, the primary purpose for which the Court of Appeals was created and the authority with which it was endowed was to review only questions of law to settle and make uniform the law "for litigants and for all people."

A useless formality may not be imputed to the framers of the constitution. To "review questions of law" was never intended to mean that the Court could assume jurisdiction by entertaining an appeal and then not decide the determinative question of law presented. It was never intended that the determination as to whether the question of law was to be decided should rest in whim or caprice. Otherwise the law would not be made uniform "for litigants and for all people."

In considering the nature and purpose of its jurisdiction, it is necessary to look to the constitution before questions of fact were permitted to be considered, and at such time, the review of an appeal without deciding the question of law involved would not alone have been an empty gesture but would have rendered nugatory the controlling provisions of the organic law.

The constitution imposed its mandate upon the Court of Appeals and placed it under the positive duty to decide questions of law presented on the appeal, a duty which the court itself recognized, as will hereinafter be shown.

The grant of additional power to the Court to review also questions of fact, in certain limited cases, in no way served to relieve the Court of its duty to review determinative questions of law. The additional power granted merely added a duty to that already existing.

The Court of Appeals has itself heretofore declared that it is under a duty to review questions of law. The Court of Appeals has recognized and acknowledged its duty in that regard in the case of *National Harrow Co.* v. *Bement & Sons* (1900), 163 N. Y. 505, 508. In that case the Court observed that the grant of additional power to the Court of Appeals to review, in certain cases, questions of fact, had been removed by the new constitution effective January 1, 1895, which limited the Court of Appeals to the review of questions of law. The Court, however, took occasion to point out what the duty of the Court of Appeals was at the time when the Court of Appeals had power to review both questions of fact and questions of law prior to the limitation contained in the then new constitution effective 1895. At page 508 the Court stated:

> "Formerly, therefore, it was the *duty of this Court* where there was a reversal upon the facts to review the question of fact as well as the question of law. * * *"

Since the creation of the Court, then, the duty of the Court of Appeals, under the organic law of the state, was to review questions of law, where the jurisdiction and power of the Court of Appeals was extended, as it now is, to give it power and jurisdiction to review questions of fact and it was also the duty of the Court of Appeals, "to review the questions of fact as well as the questions of law", which is but another way of saying that the questions of law must be reviewed. This duty, then, is one which the Court of Appeals must discharge "for all litigants and for all people".

The failure of the Court of Appeals to determine such questions of law, and its failure to discharge its primary function and duty denies to petitioner the equal protection of the law.

To conclude, therefore, if the Court of Appeals had reversed the Appellate Division without giving any ground for the reversal, or if it had reversed the Appellate Division upon the ground that the destruction of the will and the declarations of the decedent established a revocation of the will within the requirements of the statute, such a decision, even if manifestly erroneous, would be both a state matter and a matter of state law with which this Court would have little concern. But when, in the absence of notice, it gave judgment on a defense neither pleaded, proved, nor relied on by contestant, and then refused to remedy the defect on rehearing, it plainly violated petitioner's constitutional rights arising and asserted under the Fourteenth Amendment, and that is a federal question requiring review and correction by this Court.

## CONCLUSION.

**It is respectfully submitted that the petition for Writ of Certiorari in this case should be granted.**

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

No. 372

In the Matter of Proving the Last Will and Testament of

HENRY ALTMAYER,

Deceased,

as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,

Petitioner.

—*vs.*—

BEATRICE ALTMAYER RODNEY,

Respondent,

—*and*—

DONALD T. MULLANE,

Special Guardian.

## PETITIONER'S REPLY TO BRIEF OF SPECIAL GUARDIAN AND BRIEF OF RESPONDENT

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Special Guardian.

## *PETITIONER'S REPLY TO BRIEF OF SPECIAL GUARDIAN AND BRIEF OF RESPONDENT*

### Preliminary Statement.

A consideration controlling every point raised in this Court is that the Appellate Division, not the Surrogate's Court, was the trial court in this case. The matter was there

considered *de novo* under Surrogate's Court Act §309 upon evidence which was not before the Surogate and which was offered and considered for the first time in the Appellate Division (See pages 8-10 of this brief).

**Answer to Respondent's Point I.**

The principle for which the case of *Fullerton* v. *Texas,* 196 U. S. 192 and the other cases cited by respondent in her Point I stand is one with which we have no quarrel and it is concededly the general rule that a federal question first raised by petition on rehearing is not timely.

But there is an exception to that general rule that is as well established and well recognized as the rule itself, (*Great Northern Ry.* v. *Sunburst Oil Co.* 287 U. S. 358, 367), and that is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon the appeal, or is done unexpectedly at the end of proceedings when the aggrieved party no longer has any right to add to the record, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing and the challenge will be timely. *Herndon* v. *Georgia,* 295 U. S. 441.

The petition here shows that the federal claim arises from the unanticipated disposition of the case at the close of proceedings in the Court of Appeals, and this consideration puts this case forsquare within the rule enunciated in the cases of:

*Brinkerhoff-Farris* v. *Hill,* 281 U. S. 673, 677, 678;
*Saunders* v. *Shaw,* 244 U. S. 317, 320;
*Ohio* v. *Metropolitan Park District,* 281 U. S. 74, 79;
*American Surety Co.* v. *Baldwin,* 287 U. S. 156, 164;

*Missouri ex rel Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 320;
*Great Northern Ry.* v. *Sunburst Oil Co.*, 287 U. S. 358, 367;
*Herndon* v. *Georgia*, 295 U. S. 441, 444, 446, 447.

In *Saunders* v. *Shaw* (*supra*) the Court said:

"But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceedings when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for the infraction of constitutional rights if the party aggrieved could not come here. The defendant was not bound to contemplate a decision of the court before his evidence was heard. He therefore was not bound to ask a ruling or to take other precautions in advance."

In the *Herndon* v. *Georgia* case (*supra*) Mr. Justice Cardozo, in a dissenting opinion stated:

"The settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon the appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely."

The majority opinion in the *Herndon* case agreed, in that regard, with Mr. Justice Cardozo, the Court saying at page 444:

"There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented at the first opportunity for raising it. (Citations). The

> whole point, therefore is whether the ruling here assailed should have been anticipated."

The whole point in this case, too, is "whether the ruling here assailed should have been anticipated." The petitioner here was not bound to anticipate the ruling of the Court of Appeals, as will hereinafter be adequately demonstrated.

**Answer to Respondent's Point II.**

The case of *Brinkerhoff-Farris* v. *Hill* (*supra*) is a complete answer to respondent's claim that this court can have no jurisdiction because the Court of Appeals denied petitioner's motion for reargument. It was there held that

> "A federal claim first raised by petition for rehearing in a state court is in time for purposes of review here if it was raised at the first opportunity, *even though the petition was denied* without opinion." (Italics ours).

We have shown in our main brief, and it will more fully hereinafter appear, that the federal question in this case was raised at the first opportunity.

If the federal right has been denied at the close of proceedings on appeal, and the federal question is thereupon raised at the first opportunity on rehearing, the jurisdiction of this Court attaches, and naught that the state court may do can oust this Court of jurisdiction, for otherwise it would rest with the state court whether to confer or withhold the jurisdiction of this Court. Such a concept would be repugnant to the supervisory power reposed in this Court for the protection of federal rights. It is this reason which underlies the rule in the *Brinkerhoff-Farris*

case, just above quoted, and the declaration of this Court in the case of *Saunders* v. *Shaw* (*supra*) that if the party aggrieved could not come here in such case, "it would leave a serious gap in the remedy for the infraction of constitutional rights."

**As to Whether Petitioner Should Have Anticipated the Ruling Complained of.**

We have said on page 19 of our main brief that the Appellate Division held that:

> "'The contestant claims an intestacy *by reason of the revocation of the will.* The question was presented by contestant's claim that in 1939, in her presence and in the presence of the witness Kelekian, the testator had destroyed the original will with the intent of revoking it.'
>
> and admitted the will to probate. With the issue thus defined and judically settled, petitioner had no occasion to anticipate that the Court of Appeals would dispose of the appeal by sustaining a defense neither pleaded nor proved, upon grounds not relied upon by contestant to obtain the relief granted."

Let us see, then, whether petitioner should have anticipated such action by the Court of Appeals. The Appellate Division defined the issue involved as revocation by destruction and at this juncture, the will was admitted to probate. When the contestant appealed to the Court of Appeals, she appealed from the order of the Appellate Division which directed that the will be admitted to probate. What were the grounds upon which the appeal was taken? Of what did she complain and by reason of what did she contend, in the Court of Appeals, that she was aggrieved?

Only the following three grounds were advanced in the Court of Appeals and upon them she contended she was entitled to a reversal, namely:

> "Point I: As a matter of law the Appellate Division erred in its finding of fact."
> "Point II: A reversal of the judgment below is in any event required because the testimony on which it is grounded is in the record only because serious errors in rulings by the Surrogate admitting testimony by a lawyer of confidential communications received by him from his client in the course of his employment by such client:"
> "Point III: The declarations by deceased were inadmissible."

With Points II and III we are not concerned as they deal with the admissibility of certain evidence (decedent's declarations and the admission of contestant that the will was in the box) not pertinent to the inquiry here.

As to Point I, however, the claims advanced by contestant are significant in two aspects. (1) They are predicated upon the physical destruction of the will by tearing and (2) no claim is made that the will could not be found and that therefore a presumption of destruction *animo revcandi* arose.

Her claim, then, under her Point I in the Court of Appeals was (and we quote):

> "The Appellate Division placed its reversal on a determination that the appellant, Mrs. Rodney, had so conducted herself in relation to Mr. Wasserberger that *her testimony regarding physical destruction of the instrument in or about 1939* should be rejected. The disinterested testimony of Mr. Kelekian, ignored by

the Surrogate, was pronounced by the Appellate Division to be 'highly improbable'.

It is submitted that a fair reading of Mr. Kelekian's testimony will not bear out the estimate of it by the Appellate Division. Mr. Kelekian was quite clear about what he had witnessed in 1939. What he testified had happened manifestly could have happened.

The Surrogate evidently found that there was nothing done or said by Mrs. Rodney, which, when viewed in the light of all the circumstances, established any admission that the missing will physically existed *after 1939*. The proof shows that in 1940 Mr. Wasserberger on his own initiative told Mrs. Rodney that a codicil was necessary to the will. He actually drafted such a codicil and sent it to her. If the will had physically existed *at that time* is it likely that Mrs. Rodney would have done nothing about Mr. Wasserberger's suggestion? Her inactivity is itself an important indication that the *narrative of Mr. Kelekian and herself regarding the destruction of the will in 1939 was the narrative of the actual fact*. Moreover, consider what the likely attitude of Mrs. Rodney would be in respect of Mr. Wasserberger on the subject of the destruction. Remember that Mr. and Mrs. Wasserberger were then her close friends. Is it not likely that Mrs. Rodney would keep secret *the fact of destruction*, since it was connected with an episode unflattering to Mr. Wasserberger?" (Italics ours).

Her contention, then, in the Court of Appeals was that her testimony and Kelekian's testimony as to the tearing of the will in 1939 was true, that "the narrative of Mr. Kelekian and herself regarding the destruction of the will in 1939 was the narrative of the actual fact" and that what Mrs. Rodney concealed from Mr. Wasserberger was "the fact of destruction".

Her contention in the Court of Appeals was that the Appellate Division had erred in rejecting her testimony of destruction and in pronouncing Kelekian's testimony "highly improbable"; that the error consisted in the failure of the Appellate Division to accept "the narrative of the actual fact" of destruction.

Since the Appellate Division defined the issue as revocation, and admitted the will to probate upon that issue and since she claimed that her proof of destruction by tearing established the revocation which she pleaded in her answer, upon what basis can it be asserted that the proponent should have anticipated that the Court of Appeals would grant her relief by way of reversal upon grounds which were not relied on by her to obtain that relief upon an issue that was never litigated in any court. She never claimed, nor did she plead, nor did she prove, in the Surrogate's Court, the Appellate Division nor in the Court of Appeals that the will could not be found when the decedent died. It was not even contended for on the *argument* that the will could not be found and that therefore it must be presumed destroyed *animo revocandi*.

Now the Surrogate found that "the presumption of destruction *animo revocandi* attaches to the instrument of 1937 by reason of its nonproduction," predicated upon a finding that the will could not be found. The question arises whether such a finding by the Surrogate bound the proponent to anticipate that the Court of Appeals would make a similar finding. The answer is in the negative, as the following considerations clearly demonstrate.

We invite the attention of this Court to the fact that in the State of New York an appeal from a Surrogate's decree taken under Sec. 309 of the Surrogate's Court Act differs from an appeal taken from any other judgment in this important respect, namely, that the Appellate Division sits as a court of original jurisdiction as distinguished

from appellate jurisdiction, having the same power to decide the facts as the Surrogate had. The proceeding is before the Appellate Division *de novo* and it sits as a trial court.

Thus, in the Matter of Baldwin's Will, 261 App. Div. 111, 215 N. Y. Supp. 149, the Court said:

> "Whether the will in question was executed in accordance with the statutory requirements is a question of fact. (Citations). This court is required to review the facts *de novo* (Surrogate's Court Act (Laws 1920, c. 928) sec. 309."

Accord: Matter of Dunn's Will, 261 App. Div. 1040, 25 N. Y. Supp. (2) 880

In the Matter of Patterson's Will, 63 Hun. 529, 18 N. Y. S. 499, 500, the court declared:

> "In determining this question, it is necessary in the first place, to bear in mind the effect of an appeal to the Supreme Court from the Surrogate's court. A probate proceeding, by such appeal, is removed into the supreme court. *The supreme court becomes a court of original jurisdiction,* and has the same power which the Surrogate had; and may, in its discretion, receive further or documentary evidence, and appoint a referee." (Italics ours).

Again, in the Matter of Rice's Will, 81 App. Div. 223, 81 N. Y. Supp. 68. it was said:

> "This we have a right to do, because we sit more as a trial court upon the facts than as a court of review."

In this case the appeal to the Appellate Division was taken under Section 309 of the Surrogate's Court Act.

Moreover, evidence was presented to the Appellate Division which was not before the Surrogate for consideration. Thus the testimony of Mrs. Rodney appearing at pages 294 to 352 inclusive of the transcript of Record, marked "Deposition Received under sec. 309 of the Surrogate's Court Act" was not offered in evidence on the trial before the Surrogate, but was offered for the first time on the appeal to the Appellate Division and there, necessarily, considered *de novo*. Of greater significance is the affidavit of Mrs. Rodney (R. 290-293) marked "Affidavit of Beatrice Altmayer Rodney Received under Sec. 309 SCA" which was not offered in evidence on the trial before the Surrogate but offered for the first time on appeal to the Appellate Division. In paragraph 7 of this affidavit (R. 292) Mrs. Rodney states:

> "Deponent is willing to concede for the purposes of this proceeding * * * that deponent did not search decedent's safe deposit box, subsequent to the date of his death for decedent's will."

The concession thus made by her, taken together with the fact that after decedent's death the safe deposit box was never fully examined (R. 75) precluded any claim that the will could not be found, had such a claim ever been advanced.

The import of these considerations is that the Surrogate's findings were not alone academic, they were superceded by a new trial on different evidence in the Appellate Division which entertained the proceeding as a court of original jurisdiction under section 309 and considered the matter *de novo*. For that reason, the findings of the Appellate Division, and not those of the Surrogate, were the findings of the Court of first instance.

The Appellate Division had her concession (which the Surrogate did not have) *for all purposes of this proceeding,* that she did not search testators safe deposit box for the will after his death. Once that concession became part of the record, petitioner was not bound to anticipate that there could ever be a finding of fact that the will could not be found, or that presumed destruction could ever be predicated on such a finding of fact.

Since the Appellate Division made no finding that the will could not be found and made no conclusion of law that a presumption of destruction *animo revocandi* attached, the proponent was not bound to anticipate that the Court of Appeals would do so.

In *Grannis* v. *Ordean,* 234 U. S. 385, 392 this Court declared:

> "There is a motion to dismiss on the ground that the federal question was not properly raised in the state court. This motion must be denied. It is true that until the decision of the Supreme Court of the State, the Federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in the partition suit was not valid because of the insufficiency of the notice to Geilfus. It was the decision of the Supreme Court upholding the notice that first ran counter to the alleged Federal right."

The Appellate Division, as we have seen, and not the Surrogate, was the trial court in this case. and the Appellate Division upheld the petitioner. It was the decision of the Court of Appeals that first ran counter to the federal rights. Therefore the first opportunity to raise the federal question was upon reargument, and of this earliest oppontunity petitioner availed himself. The federal question was thus timely raised.

**Answer to Respondent's Claims Predicated on the Affidavit of Lawrence S. Timen (Respondent's Points V and VI).**

We claimed, in our petition and brief here, that it was neither pleaded nor proved in the courts below, that the will could not be found thereby giving rise to presumed destruction *animo revocandi* and that such issue was neither litigated nor heard in the court below.

Respondent asserts that the claim that the will could not be found after death, and the presumption of destruction *animo revocandi* arising therefrom, was not only pleaded and proved below, but that she relied upon that issue to obtain relief in all courts. As proof of such assertion she relies on the affidavit of Lawrence S. Timen.

If she is correct, then this Court must look to the Timen affidavit, and not to the Transcript of Record to determine that

> "the notice and the hearing should correspond, and that the relief granted should be appropriate to that which has been heard and determined on such notice"

in testing for denial of due process by the requirements specified by this Court in *Standard Oil Co.* v *Missouri*, 224 U. S. 270, 281.

Preliminary to any consideration of the merits of her claim, it is to be noted that the Timen affidavit, no matter what its contents, cannot serve to establish that Mrs. Rodney pleaded and proved that the will could not be found, that she relied on the presumption arising therefrom that it was destroyed *animo revocandi* or that she gave notice of that claim to proponent. The Timen affidavit can establish nothing contrary to the record, and even if Mr. Timen has sworn, in his affidavit, that Mrs. Rodney had pleaded and

proved, in the court below, that the will could not be found and that she relied on the presumption of destruction arising therefrom, such an allegation in his affidavit would have no more probative force than the allegations of similar import contained in the affidavit of Mr. Vaughan. Only the transcript of record can disclose whether Mrs. Rodney pleaded and proved that the will could not be found after death. The transcript is before this Court. Where, in Mrs. Rodney's answer (R. 24) is there any allegation that the will could not be found after death? It is there pleaded that the will was revoked.

What of the presumption of destruction *animo revocandi?* There can be no such presumption, as we have shown on page 20 of our main brief, unless it be established as a *fact* that the will could not be found, because the presumption arises only from such fact. *Schultz* v. *Schultz,* 35 N. Y. 654.

Her answer shows, then, that she did not plead that fact. Did she prove it? Her proof was not that the will could not be found because no one knew what became of it. She knew what became of the will. She testified to what became of it and so did her witness. They both testified, not that the will could not be found, but that it was destroyed by testator when he tore it, in their presence, in 1939.

It would be of no help to her if this Court were to assume that (a) she pleaded but did not prove the will could not be found, or (b) that she proved but did not plead the will could not be found, because

> "* * * the allegations and the proofs must agree, that the Court can consider only what is put in issue by the pleadings, that averments without proof and proof without averments are alike unavailing, and that the

decree must conform to the scope and object of the prayer and cannot go beyond them." *Washington R. R. Co.* v. *Bradleys,* 77 U. S. (10 Wall) 303.

It remains to consider her claims on the merits. We will consider these claims separately.

**The Timen Affidavit is Dehors the Record.**

Petitioner's grievance is that the court below gave judgment upon an issue which was neither pleaded nor proved. That issue is that the will could not be found, giving rise to its presumed destruction *animo revocandi.*

Respondent asserts that on the contrary the issue was in fact pleaded and proved below, and relies on the affidavit of Lawrence S. Timen to support that assertion.

Respondent also asserts that the Timen affidavit establishes that petitioner anticipated the ruling of the Court of Appeals, and that therefore the federal questions were not seasonably raised.

In fact the Timen affidavit is the cornerstone of respondent's opposition to certiorari. It is not in the Transcript of Record here, nor was it before the Court of Appeals for consideration, and although *dehors* the record, is availed of as a rabbit's foot, a panacea, to cure all defects below.

But the Timen affidavit is relied on, like an overruled case, as though the motiaon for resettlement, in support of which it was made, had not been granted. Whatever qualms or apprehensions petitioner had, or should have had, as to the ruling to be made by the Court of Appeals, were removed by the granting of the motion for resettlement, as will hereinafter be abundantly demonstrated. But it is not competent to establish by the Timen affidavit that such issue was litigated and heard below. Only the record here is competent to establish that fact. The Timen affidavit

was not before the court below nor was it the evidence upon which the court below made the ruling which is here assailed. It is *dehors* the record and nothing *dehors* the record (save to show that a case has become moot) may be considered here. Thus in *Russell* v. *Southard,* 53 U. S. 139, 159, this Court said:

> "This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court, sitting as an appellate tribunal."

In *Hudgins* v. *Kemp,* 59 U. S. (How.) 530, 534, this Court said:

> "And upon a motion to dismiss as well as on a hearing on the merits, no evidence *dehors* the record as certified and returned by the clerk in the circuit court, can be recited here to impeach its verity or to show that the certificate ought not to have been given. The case as therein set forth is the case before this Court."

In *Bechtel* v. *United States,* 101 U. S. 597, 600:

> "We cannot look beyond the record, and that is silent upon the subject."

In *Holmes* v. *Trout.* 32 U. S. (7 Peters) 171, 209:

> "No evidence can be looked into in this court, which exercises an appellate jurisdiction, that was not before the circuit court; *and the evidence certified with the record must be considered here as the only evidence before the court below.*" (Italics ours).

In *Thornton* v. *Carson,* 11 U. S. (7 Cranch) 596, 601:

> "There are other causes assigned why the award is unreasonable; but as the facts to prove it unreasonable do not appear in the record, they cannot be noticed by the court, even if such objections would, in law, be sufficient to set aside the award."

Again, in the case of *England* v. *Gebhardt*, 112 U. S. 502, where, as in this case, it was sought to offer an affidavit *dehors* the record, this Court at page 505, said:

> "* * * Nothing can be considered here on such writ in this class of cases, any more than in others that is not presented in some appropriate form by the record. * * * The affidavits, copies of which appear in the transcript, form no part of the record proper. The mere fact that a paper is found among the files does not of itself make it part of the record."

It follows, therefore, that even if there were merit to respondent's contentions regarding the Timen affidavit, it can receive no consideration here. But there is no merit to those contentions, as will be seen from the following analysis of her claims.

**As to the Claim that the Timen Affidavit Establishes that Respondent Relied on the Presumption of Destruction Animo Revocandi in the Court Below.**

In support of the proposition that the Timen affidavit establishes that Mrs. Rodney relied upon the presumption of destruction in the court below, she quotes from the Timen affidavit as follows:

> "This is particularly significant in view of the fact that the contestant urged a proposition of law in the

court below and in this court that by reason of non-production of the will by proponent there arises a presumption that the testator destroyed his will with intent to revoke."

Upon this language respondent seeks to establish that the issue in question was in fact litigated and heard below. We have above shown that the Timen affidavit is not competent to establish that fact, and that only the record may be availed of to determine the question. But on the merits, her claim in that regard is subject to four fatal defects:

1. The issue which, by the Timen affidavit, she seeks to show was "urged" in the courts below was not "urged" by way of pleading and proof so as to give the requisite notice to which petitioner was constitutionally entitled under the due process clause.

2. The question was "urged" by way of oral argument and briefs which are not part of the record.

3. Her oral argument and briefs did not "urge the proposition" until after petitioner had put in his proof and rested his case.

4. The question was not "urged" at all in the Court of Appeals. Even if it had been, petitioner no longer had any right to add to the record in the Court of Appeals.

*Defect No. 1.* To meet the constitutional requirement of notice, the question must be put in issue by the pleadings.

"That due process of law without which parties may not be deprived of their property gives them an op-

portunity to be heard respecting the justice of the judgment sought. *It gives notice of the issue to be determined before it is tried" Castle* v. *Persons,* 117 Fed. 843 (Italics Ours).

The grounds "relied on" to obtain the relief granted must be set forth in the pleadings and supported by proof. No other "reliance" meets the requirements of due process. In *Washington Railroad* v. *Bradleys,* 77 U. S. (10 Wall) 299, 303, this Court declared:

"It is hardly necessary to repeat * * * that the allegations and proofs must agree, that *the Court can consider only what is put in issue by the pleadings,* that averments without proofs and proof without averments are alike unavailing * * *". (Italics ours)

In *Gentry* v. *United States,* 101 Fed. 51, the Court said:

"A court can consider only what is in issue under the pleadings. The judgment may not go beyond a determination of the issues presented by the pleadings, nor beyond the scope and object of the prayers they contain. These are axioms in the law of pleading and practice. They rest upon the basic principles of our jurisprudenre that no man shall be deprived of his life, liberty or property without due process of law, and due process of law must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought."

In *Burton* v. *Platter,* 53 Fed. 901, 905, the Court said:

"A judgment or decree, to be valid, must be according to the pleadings and the proofs. The judgment is according to neither, and upon this ground it must be reversed."

In *Mofft-West Drug Co.* v. *Byrd,* 92 Fed. 290, 291, the Court said:

> "The purpose of pleadings is to notify the parties of the grounds upon which a recovery is sought or a defense is based. No rule is more indispensable to the just and impartial administration of justice, and none is better settled, than that the recovery permitted or *the defense sustained must be in accordance with the allegations and the proofs.*" (Italics ours)

It is therefore no answer for respondent to assert that the proposition was "urged" below. To give notice, it needed to be pleaded, and the proofs needed also to support the pleadings. Her proof was that the will was torn and thereby revoked. (R. 178, 216, 340)

In *Boone* v. *Chiles,* 35 U. S. (Peters) 177, 209, the court stated:

> "There was therefore no allegation in the answer of either, which referred to the deed; it was not made a part of their case, which was put on a *contract* of purchase and not a *deed* consummating it by a conveyance. A party is not allowed to state one case in a bill or answer, and make out a different one by proof; the *allegata* and *probata* must agree; the latter must support the former, (citations) and there is no one subject of equity cognizance on which there is a wider difference between a deed and a contract of purchase, than in the one now under consideration."

In the case at bar there is no one subject of cognizance in decedent estates on which there is a wider difference than exists between a will that is revoked or attempted to be revoked by its physical destruction and a will which cannot be found after search because no one knows what has

become of it and is therefore *presumed* to have been destroyed.

She did not plead that the will could not be found, and her claim of "reliance" thereon accordingly collapses.

*Defect No. 2.* The Timen affidavit does not convey nor was it intended to convey, that the "proposition which was urged" by contestant was raised by her in her pleadings and proof. The transcript of record here excludes any such hypothesis. Mr. Timen referred in his affidavit to her oral argument and her briefs submitted after petitioner's proof was in and the record closed. (See Defect No. 3, post).

Briefs are not part of the record. In *Harding* v. *Illinois*, 196 U. S. 78, 84, the Court said:

> "Nor does certification of the briefs by the clerk of the state supreme court, *which are no part of the record*, help the matter." (Italics ours)

In *Wall* v. *Cox*, 181 U. S. 244, 247, it was said:

> "* * * we are confined to the facts stated in the certificate and cannot consider the allegations made in the briefs of other facts."

*Defect No. 3.* Her oral arguments and briefs, did not "urge" the proposition below until after petitioner had put in his proof and rested his case. (R. 257, 151.)

A claim that no will has been found cannot serve as a claim that the will *could not* be found. The latter obtains from search and inability to find, the former imports failure to search and it is conceded for all purposes of this

litigation that there was no search (R. 292, par. 7). Even if she had "urged" that the will could not be found, it was necessary that she do so before petitioner had rested his case, in order to satisfy the constitutional requirement as to notice. Thus in *Castle* v. *Persons,* 117 Fed. 835, 843, the Court said:

> "One may not bring suit upon one cause of action and recover on another, nor may he go to trial upon one defense and sustain judgment in his favor upon another and inconsistent defense. He may not deny in his answer the plaintiff's averments of a good cause of action and then defeat him by a confession of the truth of those averments, and an avoidance of their effect by the proof of new matter *no notice of which was given by the pleadings or by the course of the trial until plaintiff had introduced substantially all his evidence.* Proof without averments and averments without proof are equally unavailing (citations)". (Italics ours)

It has above been shown that the Appellate Division and not the Surrogate's Court is the trial court in this case; that it was a trial de novo in the Appellate Division, under section 309 of the Surrogate's Court Act, upon new evidence which was not before the Surrogate, and which was offered and considered for the first time in the Appellate Division. The statute specifies that new roof may be received in the case. Petitioner put in additional evidence (R. 283-352). Respondent could then have availed herself of the opportunity to put into the record a claim that a search had been made for the will but it could not be found. She could have there offered additional testimony and had a referee appointed. It was a trial de novo. But it was only after the record was closed, and stipulated to as containing the whole case, that she "urged" in her argument that the presump-

tion of destruction obtained, not from the fact that the will could no be found, but from the fact of its "nonproduction by proponent".

"Nonproduction" does not give rise to the presumption because it is not equivalent to the fact that the will could not be found. The latter fact is the basis of the presumption. *Schultz* v. *Schultz,* 35 N. Y. 653, whereas wilful suppression of an existing will would create "non-production" but could not create a presumption of destruction *animo revocandi.*

*Defect No. 4.* She did not "urge" the question at all in the Court of Appeals, and it is the proceeding and the ruling in that court which is here assailed. That is the court which first denied petitioner his federal rights. And in that court it was too late for petitioner to add to the record. Thus, in *Saunders* v. *Shaw,* 244 U. S. 317, 320, the Court declared:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice granted this writ. Of course, ordinarily, this would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding *when the plaintiff in error no longer had any right to add to the record,* it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance." (Italics ours)

**Regarding Respondent's Claim that the Timen Affidavit Establishes that Petitioner Anticipated the Ruling of the Court of Appeals.**

The language of the Timen affidavit here relied upon by respondent is as follows:

> "Under the last sentence contained in Section 602 of the Civil Practice Act, the proponent would be prejudiced unless the order were resettled to specify the findings of this Court and the findings of the court below which were reversed in that *in the absence of such specification,* there would be a *presumption* in the Court of Appeals, upon appeal to that Court, *that finding of fact made by the Surrogate that the will could not be found at testator's death, was affirmed* (i. e. by the Appellate Division) and that the reversal in this Court was upon questions of law only. * * *
>
> Resettlement is therefore asked so that if the Court of Appeals deems fit to sustain the presumption of destruction *animo revocandi* urged by the contestant in this Court and in the court below, *it would need to do so only after reviewing the facts,* and reversing the findings of fact made in this Court, *instead of presuming that this Court agreed with the Surrogate that the will could not be found at* the time of the testator's death."

We have above italicized that portion which demonstrates what was anticipated, the nature of the relief sought to overcome petitioner's apprehensions, and that such apprehensions obtained only "in the absence of such specifications", that is, in the absence of resettlement.

What was anticipated was that, had the Appellate Division made *any* error in law, the Court of Appeals would be

compelled, in the absence of resettlement, to give judgment upon findings of fact which it was powerless to review, regardless of whether or not there was any evidence in the record to support those findings. In short, what was apprehended was that the Court of Appeals would be compelled to give judgment without looking at the facts, and not that it would look at the facts and then give an improper judgment; and it was so apprehended because:

1. The jurisdiction of the Court of Appeals was "limited to the review of questions of law" only, and it had no power to review questions of fact except where the Appellate Division made new findings of fact and reversed those of the trial court (New York State Constitution Article 6, sec. 7).

2. Under section 602 of the Civil Practice Act, (in the absence of new findings of fact by the Appellate Division and reversal of the Surrogate's findings) the Court of Appeals *must* presume that the Appellate Division affirmed the findings of fact made by the Surrogate, that the will could not be found at testator's death. As stated in the Timen affidavit: ". . . there would be a *presumption* in the Court of Appeals . . . that finding of fact made by the Surrogate that the will could not be found at testator's death *was affirmed*" (i. e. by the Appellate Division). Thus, in *Karl* v. *State of New York,* 279 N. Y. 555, the Court said:

> "The Appellate Division reversed the awards made to claimants by the Court of Claims and dismissed the claims as a matter of law. It did not, however, reverse any of the findings of the Court of Claims, or make any new findings. The findings

of the Court of Claims, therefore, stand as affirmed by the Appellate Division. Civil Practice Act, sec. 602."

3. That the constitution and the statute rendered the Court of Appeals powerless (in the absence of resettlement) from reviewing the facts and disabled it from searching the record to determine whether there was any evidence to support a finding of fact that the will could not be found, and placed the Court of Appeals under statutory compulsion to give judgment upon the fact found by the Surrogate and presumed affirmed by the Appellate Division; thus the Court of Appeals would have no alternative but to hold, from such finding, that the presumption of destruction attached and give judgment on an issue neither pleaded nor proved.

But the need to apprehend or anticipate such a ruling (which could obtain only in the absence of resettlement) was forever removed when the Appellate Division granted the motion to resettle its order of reversal. In the resettled order (R. 279-283) the Appellate Divition made its own finding of fact and reversed the Surrogate's findings of fact, *thereby forever barring the Court of Appeals from making any presumption under section 602 of the Civil Practice Act* predicated on the failure of the Appellate Division to reverse the Surrogate's findings or the failure of the Appellate Division to make its own new findings of fact. The Court of Appeals could no longer give judgment without looking at the facts. The Court of Appeals, unlike the Surrogate, became bound by the admission "for the purposes of this proceeding", that Mrs. Rodney did not search the box for the will (R. 292). If, after resettlement, the Court of Appeals was desposed to hold that there was a

presumption of destruction *animo revocandi,* it would have to look at the facts for evidence to support a finding that the will could not be found, instead of presuming, under the statutory compulsion of section 602 of the Civil Practice Act, that the Appellate Division affirmed the Surrogate's findings, or, as stated by Mr. Timen in his affidavit:

> "it would need to so only after reviewing the facts * * * *instead of presuming that the Court agreed with the Surrogate that the will could not be found at the time of testator's death.*"

The respondent rests her whole case in this Court on the affidavit of Lawrence S. Timen. This is the same as resting upon an authority which has been subsequently overruled. The Timen affidavit could be of no use to her here unless the motion (in support of which the Timen affidavit was made) to resettle the order of reversal in the Appellate Division were denied. But the motion was not denied, it was granted, and only the resettled order of reversal appears in the transcript of record. (R., 279-283)

**Answer to Respondent's Point III.**

Mr. Vaughan says, on page 18 of Respondent's brief, that what happened below is seriously distorted by the petitioner here. We said that it was neither pleaded nor proved below that the will could not be found. He says it was pleaded and proved. The transcript of record discloses that it was not pleaded or proved and discloses also where the distortion lies.

Mr. Vaughan also says (same page) that his client Mrs. Rodney pleaded in her answer

> "(b) that the paper in question had been 'duly revoked' in the lifetime of deceased. She did not by her pleadings specify any theory of revocation (fol. 71)."

and on page 24 of respondent's brief:

> "This allegation is consistent with any kind or revocation including revocation presumed to have happened because the original will was not produced and its fraudulent destruction was not proved."

The theory which Mr. Vaughan here urges is subject to the fatal defect that the allegations and the proofs must agree and his client's pleading and proofs do not agree. The proof must support the pleading. In *Washington Railroad* v. *Bradleys,* 77 U. S. (10 Wall) 299, 303, this Court said:

> "* * * the allegations and the proofs must agree."

and in *Boone* v. *Chiles,* 35 U. S. (Peters) 177, 209:

> "A party is not allowed to state one case in a bill or answer, and make out a different one by proof; the *allegata* and *probata* must agree."

In *Eddy, etc.* v. *Blackburn,* 70 Fed. 949, 954:

> "It is however, stringently required that the proof must agree with and support the pleadings."

Her proof is that decedent physically destroyed the will by tearing it in 1939, thereby revoking it. That proof can support only her plea that the will was revoked by physical destruction; it is opposed to, and therefore cannot agree with or support a claim that the will could not be found, even if such a claim had been pleaded, and it was not pleaded.

Respondent further argues on page 21 of her brief that on the appeal to the Appellate Division new facts were received by that ourt, under section 309 of the Surrogate's Court Act but that

> "Such facts did not alter the essential shape of the proof as it came before the Surrogate"

and on page 24 of respondent's brief:

> "Mr. Wasserberger also says that 'No notice was ever given of any claim that after a search the will could not be found' (Petition p. 3). This statement is untrue. Such notice is contained in Mr. Wasserberger's Exhibit 7 (fols. 796-800). It is also in the petition of Mrs. Rodney for letters of administration put before the Appellate Division by Mr. Wasserberger himself (fols. 848-854)."

"The essential shape of the proof" considered by the Appellate Division was materially "altered" from what it was "as it came before the Surrogate". The Surrogate never had before him (1) Mrs. Rodney's testimony that the will was torn in her presence in 1939; (2) Mrs. Rodney's petition for letters of administration (in the administration proceeding not the probate proceeding) in which she alleged that she knew of no will of decedent and could find none, which petition was dated February 5, 1944, and (3) her *subsequent* concession in this proceeding, dated April 5, 1944, in which she conceded "for the purposes of this proceeding" (R., 292, par. 7)

> "that deponent (Mrs. Rodney) did not search decedent's safe deposit box, subsequent to the date of his death for decedent's Will",

and her *subsequent* concession (R., 291, par. 5) that she did have knowledge of a will of decedent and

> "that deponent was present when it was executed."

Her petition in the administration proceeding was not her proof *in this case* that the will could not be found. It was offered not by her, but by petitioner to show, and it did show, that the claim that the will could not be found was never advanced in the probate proceeding, but in an independent administration proceeding. In offering that petition, proponent said to the Appellate Division:

"The Surrogate stated:

> 'The daughter of deceased applied for letters of administration asserting that she had made diligent search for the will of deceased but had not found it. She asserted intestacy.'

But that was not what she asserted in the probate proceeding. That was what she asserted in the administration proceeding in her petition for letters of administration.

She did not, in the probate proceeding, assert that the will could not be found. What she alleged in her answer and asserted on the trial was that it had been destroyed and she claimed that a revocation had thereby been effected."

It is sufficient to observe, however, that her administration petition was not in evidence before the Surrogate, and when the Court of Appeals affirmed the decree of the Surrogate:

> "upon the ground that the findings of the Surrogate were in accordance with the weight of the evidence"

it affirmed a decree made by the Surrogate upon evidence which was never before him for consideration.

Mr. Vaughan relies also on the letter of George Feinberg (R. 266). This letter states that Mr. Feinberg made an

independent search for the will and is satisfied that there is no will in existence "that can be probated". He does not state that no will could be found.

But the *notice* which is required by the constitution to comply with the due process clause is not satisfied by the administration petition or the Feinberg letter. Due process requires that the *pleadings* give such notice before the issue is tried, and it was necessary that respondent's answer plead that the will could not be found. The letter and the petition antedated her answer, and once her answer was served, pleading revocation, these documents became academic because the notice given by her pleading was that the will had been revoked, and not that it could not be found.

**Answer to Respondent's Point IV.**

In disputing that the court below granted relief that was not within the grounds relied on by Mrs. Rodney to obtain it, respondent says:

> "Mr. Wasserberger here inverts what happened. There was not so much a grant of relief to contestant as there was a denial of relief to petitioner."

When the appeal was taken to the Court of Appeals, the will was admitted to probate. In her appeal she prayed that the decree admitting the will be reversed. In the court below petitioner was a respondent. Her prayer for relief was granted and the Court of Appeals reversed, but not upon grounds relied on by her to obtain it. She relied on her pleading and proof of revocation by actual physical destruction not upon presumed destruction.

Regarding the denial of equal treatment, respondent says at page 25 of her brief:

"If it (the Court of Appeals) failed to decide what Mr. Wasserberger calls 'the question of law as to revocation' then so too did the Surrogate in the first instance. But this constitutional ground of appeal if it ever existed was not asserted at any time by Mr. Wasserberger until his definitive defeat in the Court of Appeals."

Of course the Surrogate was not required by the State Constitution, as was the Court of Appeals, to review questions of law. The Appellate Division held as a matter of law that revocation was the "question presented" (f. 1061). This question of law (revocation is always a question of law) was squarely before the Court of Appeals and it was under constitutional mandate to review it. Its silence as to revocation was a denial of equal treatment. But the Surrogate was under no constitutional compulsion to review questions of law—he had no appellate powers whatever. Petitioner was therefore denied equal treatment for the first time by the Court of Appeals at the close of proceedings in that court.

**Answer to Respondent's Point VIII.**

For no apparent reason other than an unrestrained desire to besmirch a fellow member of the bar Mr. Vaughan engages in a personal attack on petitioner, stating that petitioner's motive in endeavoring to sustain the will "was concerned deeply with getting the maximum amount of money he could from the estate". He refers to the now pending appeal in the Appellate Division, and concludes by asking for double costs. We can appreciate Mr. Vaughan's contingent interest in success but can see in it no justification for vilification.

We have experienced these gentlemanly tactics in the Court below and it is sufficient to quote from our brief in the Appellate Division as follows:

"By dint of some curious twist of perverse reasoning, Mr. Vaughan argued not only in the Court of Appeals, but before the Surrogate in opposition to an allowance to proponent for counsel fees, that it was the proponent, and not his client Mrs. Rodney, who was in fact the swindler in this case; that it was the proponent who was the malefactor and that he was motivated to probate the will solely by his eagerness to 'fulfill his rosy financial expectations'. Mrs. Rodney's conduct, argued Mr. Vaughan, was not only plausible, it was honorable, and further, that her testimony and Kelekian's testimony as to the destruction of the will was truthful. This is what he argued in the face of the Surrogate's finding (concurred in by the Court of Appeals) that 'the speech and conduct of the daughter (Mrs. Rodney) leave her open to grave suspicion' (that she committed a felony) (p. 271). This is what he argued, also, in the face of a finding four times adjudicated by the Courts, that proponent's good faith was not open to question: first by the Surrogate after trial, again when this Court admitted the will to probate, thirdly when the Court of Appeals confirmed the Surrogate's findings and for a fourth time by the decision of the Surrogate which appears at page 76 of the record on this appeal. On the basis of that argument Mr. Vaughan asked that proponent be denied an allowance altogether, that proponent personally, not the estate, pay the costs, and that proponent also be adjudged to personally pay the Special Guardian's allowance.' "

The Surrogate's latest decision, above referred to, appears in the appendix herein. As to the failure of the Special Guardian to appeal, this subject is separately treated. With regard to the novel suggestion that peti-

tioner "represents interests aggregating $4000" it is sufficient to observe that no executor, save where he is also a legatee, ever has any interest other than the duty to see that the testator's wishes are not frustrated and every executor has an interest to the extent of statutory commissions.

**As to the Special Guardian.**

One is at a loss to understand the function of the Special Guardian's "brief". He does not criticize the decision of the Court below. He advances not a solitary authority in favor of his ward, nor does he argue for reversal; neither does he seek the granting of certiorari when his ward can profit only if certiorari is granted and reversal results.

He is not a party to the litigation pending here, and we are advised by him that upon his personal inquiry to the Clerk of this Court he was informed that he was not required to file a brief. Then why is he here in this Court? He is here, he says on page 2 of his brief "in the hope that it may be helpful to this Court in deciding the petition now pending before this Honorable Court for a Writ of Certiorari."

In concluding his brief, under caption "Special Guardian's Position on this Petition" he says that "in view of the fact that it would be to his ward's interest to have the propounded document admitted to probate, he does not oppose this petition." Then why, in the very last sentence on page 11 of his brief, did he preface that statement with the statement that "the undersigned Special Guardian cannot in his own mind see that any constitutional question is involved herein," if he in good faith intended to advance the interests of his ward by not opposing the petition?

He could with greater honesty have withheld opposition to the petition for a writ by simply abstaining from filing a brief, a course expressly indicated to him when he was informed by the Clerk of this Court that there was no need for him to file a brief. Instead, however, he files his brief in which he denies that any federal question is involved, thereby raising the only substantive ground upon which the petition may be denied. By what process is such a position intended to advance the interests of his ward in this Court? We have taken occasion at an earlier stage of this litigation when intestacy had first been decreed, to meet his similar conduct with the following comment which we quote from our reply brief in the Appellate Division of the New York Supreme Court:

> "It is appropriate at this point to comment upon the unusual attitude of the special guardian in this proceeding. His brief does not seek reversal of the decree. Neither does it seek an affirmance. For aught that appears it seeks no relief. His brief is thus less forthright than his declarations for he has stated to the appellant that he will argue for affirmance. We thus have the astonishing spectacle of a special guardian charged with the protection of the interests of his infant ward, asking for a judgment of this Court adverse to those interests which he he in duty bound to safeguard.
>
> Perhaps the attitude of the special guardian in that respect will be more easily understood from an examination of folio 517 which discloses that the special guardian, at his own instance, consulted with his ward only at the office of the attorney for the objectant, the one person in all the world who had it within her power to acquiesce in the probate of the will which would give her own child approximately $100,000. in

trust, but who elected instead of object, thereby not only depriving the ward of a substantial inheritance, but irrevocably setting up her own interests as adverse to those of the infant. Folio 517 discloses that the infant's preparation for trial and whatever interviews transpired between the guardian and his ward were conducted in the camp of the adverse party. He did not consult her in the privacy of his own offices although the opportunity was offered him (517). The special guardian did not call the ward as a witness. He conducted neither direct nor cross examination of the infant upon the trial.

The infant's interests were interwoven with those of the proponent and opposed to those of the objectant. The special guardian at no time consulted with his ward in the presence of the proponent with whose interests hers were allied. Her interests could be preserved only if the proponent prevailed. There was thus, as above stated, the astonishing spectacle of the special guardian conducting his ward's preparation for trial in the office of the attorney for the objectant whose interest was diametrically opposed to that of the infant.

It is claimed that the person aggrieved by the denial of probate is the infant but that she acquiesced therein.

Infants have immature judgment and lack experience. It was precisely in contemplation of the likelihood that an infant, out of devotion, loyalty or affection would disregard or perhaps misapprehend her interests, and out of an abiding trust in the integrity of the parent, acquiesce in a forfeiture of her interests, that the legislature in its wisdom placed on the statute books a mandate to the courts that a special guardian shall be appointed to safeguard the interests of infants.

It is thus no answer to assert that the infant acquiesced in an adverse decision. The special guardian states in his brief that he urged in the Court below that the sole issue is one of revocation, that the proof of revocation is insufficient, and that the will should be admitted to probate. It is difficult then, to understand how the special guardian did not feel aggrieved by a decision contrary to the relief he sought in the Court below and what motive impelled him to refrain from joining in the appeal although he was requested to do so by the appellant. The special guardian is under a duty to advance the interests of his ward. Far from doing so, he instigated and joined with the objectant in a futile motion before the Surrogate, after the entry of the decree, and shortly before the argument of the appeal, to compel the appellant to furnish $2500. additional security under Sec. 299 of the Surrogate's Court Act with a view to frustrating the appeal. The relief sought was a bond in favor of the objectant for damages if the appeal resulted in an affirmance. The special guardian not only joined in the motion of record, but submitted an affidavit and appeared on the argument in support of the motion. No possible benefit could inure to the infant if that motion were granted.

We come now to a consideration of the Special Guardian's brief. Not a single point or authority is offered in the infant's behalf.

Why, then, is the special guardian submitting a brief on this appeal? 'To help this Court,' he says, 'in deciding this appeal.' It is not his duty to help the Court. It is his duty to help the infant and advance her interests. He is here as a party, not as *amicus curiae*.

His ward has potential rights under the rejected will until every remedy has been exhausted. In the case of *Re Schrier's Will,* 157 Misc. 310, 283 N. Y. Supp. 234, the Court said:

> 'On the contrary, so long as his wards possess any potential rights, it is the duty of the special guardian to protect and advance those rights by every honorable means and expedient which is known and available to him, under penalty, if he proves derelict in the performance of his duties, that he may subsequently be compelled to respond in damages to his wards for his failure adequately to protect the rights which they possessed.'

His duty is not merely that of an attorney. The Court is responsible for his appointment and the infant has no voice in his employment. (*Downey* v. *Fogarty,* 175 Misc. 411, 23 N. Y. S. (2d( 585.)

They assert that the infant acquiesced in the adverse decision, but the infant does not control the institution, progress or disposition of the litigation and if the appeal serves to advance her interests, the special guardian was under a duty to prosecute it regardless of the infant's desire. (*Goishen* v. *Samor Realty Co., Inc.,* 167 Misc. 477, 4 N. Y. Supp. (2d) 107, 111.)

His duty is to join in the prayer of the appellant (*Shea* v. *Bergen,* 59 Misc. 294, 110 N. Y. Supp. 572, 575).

In short, it was his duty to appeal. The Court 'will assume that the Special Guardian in making the appeal is acting within the line of his duty.'' (*Re Edwards,* 110 App. Div. 623, 97 N. Y. Supp. 185, 187.)

On this appeal the special guardian has stated he argues for affirmance of a decree adverse to his ward's

interest. This is, at the least, divided loyalty. In *Re Wechsler's Estate,* 152 Misc. 564, 273 N. Y. Supp. 968, 972, the Court said:

> 'A situation of this character requires the severe condemnation of the court. A Special Guardian is appointed for the protection of the infant, and is held to a duty of strict and undivided loyalty to the infant's interest.'

In his brief, he concludes with 'Special Guardian's Position' in which he 'submits this analysis of the testimony in the hope that it may be helpful to this court in deciding this appeal.' So far as the infant is concerned, he takes no action whatsoever.

Particularly pertinent in this connection is the decision of the Court in *Re Bielby's Estate,* 91 Misc. 353, 155 Supp. 132, 142 wherein the Court said:

> 'The special guardian in a moment of aberration, or wholly misconceiving the practice as to pleadings in this Court, filed a general formal answer used in the Supreme Court in partition and other actions, alleging:
>
> "That he is a stranger to all and singular of the matters and proceedings in said petition set forth, and submits his rights as such guardian and of the rights of said minor in the above-named estate to the court for its protection thereof."
>
> * * * Apparently the only redeeming feature in the attempted pleading is a frank confession that the special guardian "is a stranger to all and singular of the matters and proceedings." It is the duty of a special guardian, upon his appointment, to cease

> to be a stranger to all matters involving the minor's interest and to so inform himself as to the condition of those interests as to be able to intelligently and legally act at all times in court in the infant's behalf.'
>
> In the *Bielby* case (*supra*) the special guardian at least attempted to entrust the infant's welfare to the protection of the Court. In the case at bar even that gesture is lacking."

In the court below the Special Guardian stated in his brief: "Thus the pleadings directly raised the issue of revocation. * * * Upon the trial the proof closely followed the issues raised by the pleadings. * * * It is apparent, therefore, that the *sole* issue was a factual one: Was there an actual revocation of the will by the testator?"

Having thus recognized and asserted the sole issue in the case, and in the absence of any adjudication of that issue by the Surrogate or the Court of Appeals, how could the Special Guardian, who has the benefit of the cases and points in petitioner's supporting brief, assert in this Court, without advancing a single authority to support the assertion, that no constitutional question is here involved, and at the same time pretend that he seeks to advance the interests of his ward? He is not a party here, yet he appears *pro se,* but there was no need for him to appear at all, and he would have rendered his ward a far greater service if his argument were left unsaid. If certiorari is denied his ward will never gain her inheritance.

He says that he was granted costs in the Appellate Division. We are convinced he was granted such costs as a result of an oversight. He was a respondent there, and moreover, he was roundly censured on the argument by the Chief Justice for his failure to take any steps on behalf of his ward, a consideration which would negative any suggestion that the Appellate Division approved his conduct!

## CONCLUSION.

**The petition for Writ of Certiorari in this case should be granted.**

Respectfully submitted,

EDWIN B. WOLCHOK,
Counsel for Petitioner.

EDWIN B. WOLCHOK,
Attorney for Petitioner,
135 Broadway,
New York, N. Y.

LAWRENCE S. TIMEN,
*Of Counsel.*

## Appendix "A".

Surrogate's Court Act. Sec. 309.

"*Power of appellate court; further testimony.*

Where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact, which the surrogate had; and it may, in its discretion, receive further testimony or documentary evidence, and appoint a referee."

## Appendix "B".

### Opinion.

Law Journal 3/18/46

Estate of Henry Altmayer—In the original probate proceeding the court allowed to the unsuccessful proponent in this court his expenses incurred in the effort to probate the propounded paper. That allowance was based on a finding of good faith on the part of proponent though the court held that the instrument propounded should not be admitted as deceased's will. The finding by the Appellate Division that the proponent had in fact established the propounded paper as deceased's will necessarily confirmed proponent's good faith in the proceeding. The later determination by the Court of Appeals reversing the Appellate Division and confirming the result reached in this court does not alter the basic facts upon which good faith of the proponent was found by this court. Obviously the appeal to the Appellate Division was justified by the event in that court. Having obtained a decision that the propounded paper was in fact the will of deceased it was proponent's obligation to defend that position when the appeal was taken to the Court of Appeals. In the circumstances, his good faith on the appeal to the Court of Appeals is apparent. Against this background the court should exercise its discretion in proponent's favor in allowing him costs in the Court of Appeals. Such costs have been taxed in the sum of $465.24. In addition the court, in the exercise of discretion, allows to proponent for his expenses for counsel on both appeals the aggregate sum of $2,500. The allowance and the costs are directed to be paid out of the estate. No costs will be taxed in favor of the successful party against the proponent personally. The proposed decree on remittitur should be amended so as to recite this decision and so as to make provision for the allowances here authorized. Proceed accordingly.

FILE COPY

SEP 9 1946

CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM 1946 No. 372

In the Matter of Proving the Last Will and Testament of HENRY ALTMAYER,

Deceased,

as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,

Petitioner,

*v.*

BEATRICE ALTMAYER RODNEY,

Respondent,

*and*

DONALD T. MULLANE,

Special Guardian.

## AFFIDAVIT AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VAUGHAN AND LYONS,
Attorneys for Respondent.

JAMES N. VAUGHAN,
of Counsel.

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**Affidavit of James N. Vaughan.**

IN THE

# Supreme Court of the United States

OCTOBER TERM 1946 No. 372

In the Matter of Proving the Last Will and Testament of HENRY ALTMAYER,

Deceased,

as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,

Petitioner,

*v.*

BEATRICE ALTMAYER RODNEY,

Respondent,

*and*

DONALD T. MULLANE,

Special Guardian.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES N. VAUGHAN, being duly sworn, deposes and says:

1. I am a lawyer duly admitted to practice in all the Courts of New York State. I am also admitted to prac-

tice before this Court. I represent the respondent on the present application for a writ of certiorari.

2. The respondent engaged my services in the first instance after the reversal of the Surrogate's decree by the Appellate Division of the Supreme Court. I am therefore personally familiar with the facts hereinafter set forth since I have continuously represented her since that time.

3. The first order of the Appellate Division was dated the 27th day of June, 1945. A copy thereof is annexed hereto and marked Exhibit A. This order was not entered until the 14th day of August, 1945. My client thereafter duly noticed an appeal from said order. Said notice was served on or about September 19, 1945.

4. On notice dated September 27, 1945 the successful party in the Appellate Division, namely, Mr. Wasserberger moved that Court for resettlement of its order of reversal. To support the motion an affidavit was made, served and filed by Lawrence S. Timen. Copy of said affidavit dated the 27th day of September, 1945 and sworn to before Mr. Wasserberger is annexed hereto and marked Exhibit B.

5. I made an affidavit in this proceeding dated March 1, 1946, a copy of which is annexed hereto and marked Exhibit C.

6. The sequel to the final decision by the Court of Appeals on the merits follows:

> January 22, 1946 the remittitur was filed with the Clerk of the Surrogate's Court, New York County (the decision of the Court of Appeals having been published in the New York Law Journal January 19, 1946).

February 20, 1946, with the express consent of Mr. Wasserberger and the Special Guardian, the Surrogate's Court by order reinstated the Letters of Administration originally issued to my client but revoked following the reversal in the Appellate Division.

March 22, 1946 a decree on remittitur was made fully effectuating the determination in the Court of Appeals and also fixing costs and counsel fees for Mr. Wasserberger and the Special Guardian. Mr. Wasserberger claimed as his compensation for prosecuting his appeals unsuccessfully the sum of $25,000. He was allowed $2,500.

March 23, 1946 my client as Administratrix paid through me to Mr. Wasserberger his costs and disbursements in the sum of $423.34.

April 3, 1946 notice of motion in the Court of Appeals for reargument and to amend the remittutur was served.

April 18, 1946 the motion for reargument was denied.

April 23, 1946 Mr. Wasserberger noticed an appeal to the Appellate Division from so much of the decree on remittitur as fixed his allowance for counsel fees in the sum of $2,500.

I later duly made a motion to dismiss the last mentioned appeal for failure to make the case and to bond the appeal. This motion was granted to the extent of requiring Mr. Wasserberger to file the required undertaking, make the case and notice the appeal for argument on a date stated by the Appellate Division. The appeal has been noticed for argument September 27, 1946.

*Affidavit of James N. Vaughan.*

On July 11, 1946 Associate Justice Reed made an order ex parte extending Mr. Wasserberger's time to apply for a writ of certiorari to August 7, 1946.

August 6, 1946 petition for writ of certiorari was filed in the Supreme Court.

August 15, 1946 copy of the transcript of record, petition and brief were served on respondent's counsel.

JAMES N. VAUGHAN.

Sworn to before me this
7th day of September, 1946.

JESSIE L. NAPOLETANO,
Notary Public,
Bronx County.
Bronx Co. Clk's No. 27, Reg. No. 69-N-7.
New York Co. Clk's No. 251, Reg. No. 210-N-7.
Kings Co. Clk's No. 21, Reg. No. 161-N-7.
Queens Co. Clk's No. 2164, Reg. No. 112-N-7.
Commission Expires March 30, 1947.

## Exhibit A.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 27th day of June, 1945.

Present: Hon. FRANCIS MARTIN, P. J.
" ALFRED H. TOWNLEY,
" EDWARD J. GLENNON,
" ALBERT COHN,
" JOSEPH M. CALLAHAN.

In the Matter of Proving the Last Will and Testament of

HENRY ALTMAYER,
Deceased,

as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,
Proponent-Appellant,

BEATRICE RODNEY ALTMAYER,
Objectant-Respondent,

DONALD T. MULLANE,
Special Guardian-Respondent.

15651

ORDER OF REVERSAL ON APPEAL FROM SURROGATE

An appeal having been taken to this Court by proponent-appellant EMIL H. WASSERBERGER, from so much of a decree of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 23rd day of June, 1944, as denies probate of a carbon copy of an instrument alleged to be a will dated May 1, 1937, and said appeal having been argued by Mr. Lawrence S. Timon, of counsel for the appellant, and by Mr. George

Feinberg, of counsel for the objectant-respondent, and by Mr. Donald T. Mullane, special guardian-respondent, pro se; and due deliberation having been had thereon, it is hereby unanimously

ORDERED and ADJUDGED that the said decree so far as appealed from be and the same is hereby, in all things reversed upon questions of fact and of law, with costs to the appellant Emil H. Wasserberger and to the special guardian, Donald T. Mullane, payable out of the estate, and it is further

ORDERED, ADJUDGED and DECREED that the carbon copy of an instrument propounded as decedent's will dated May 1, 1937, be and the same hereby is admitted to probate as the Last Will and Testament of Henry Altmayer, Deceased, and the proceeding remitted to the Surrogate of the County of New York for further action in accordance with the opinion of this Court.

Enter,

A. H. T.

## Exhibit B.

APPELLATE DIVISION OF THE SUPREME COURT

First Judicial Department

In the Matter of Proving the Last Will and Testament of

Henry Altmayer,

Deceased,

as a Will of Real and Personal Property.

---

Emil H. Wasserberger,
Proponent-Appellant,

Beatrice Rodney Altmayer,
Objectant-Respondent,

Donald T. Mullane,
Special Guardian-Respondent.

State of New York
County of New York } ss.:

Lawrence S. Timen, being duly sworn, deposes and says:

I am of counsel for the proponent-appellant herein associated with Edwin B. Wolchok, Esq., attorney of record for said appellant.

This is an application to resettle the order of reversal on appeal from the Surrogate of the County of New York, which said order was entered and filed in the office of the Clerk of this Court on August 14, 1945.

The application for resettlement is made for the reason that the said order as made and entered herein con-

tains a statement that the reversal was upon the law and the facts but fails to specify, as required by Section 602 of the Civil Practice Act, the findings of fact of the court below which was reversed or modified and the new findings made by the Appellate Division.

The order of reversal was made not only upon the law, but upon the facts, and the order so states. The salient facts upon which the Surrogate was reversed are that after its execution, the will was placed in a safe deposit box of the Manufacturers Trust Company subject to the joint control of the deceased and the contestant, and that the will remained in the box up to at least the early part of January 1944; that the deceased died on February 1, 1944, and that the only person who had access to the box where the will was deposited after deceased was bedridden for several months prior to his death, was the contestant. Since this Court found as a fact that the will was in the box in January 1944, within a month of testator's death, and that the only person who had access to the box during the *several* months decedent was bedridden, was the contestant, it necessarily follows as a fact that the will was in existence in the said box at the time of decedent's death or was fraudulently destroyed during his lifetime.

The findings of fact contained in the decision of the Surrogate are precisely to the contrary, and the Surrogate's findings are therefore reversed by the findings of this Court.

Under the last sentence contained in Section 602 of the Civil Practice Act, the proponent would be prejudiced unless the order were resettled to specify the findings of this Court and the findings of the court below which were reversed in that in the absence of such specification, there would be a presumption in the Court of Appeals, upon

appeal to that Court, that finding of fact made by the Surrogate that the will could not be found at testator's death, was affirmed and that the reversal in this Court was upon questions of law only.

This is particularly significant in view of the fact that the contestant urged a proposition of law in the court below and in this court that by reason of the non-production of the will by proponent there arises a presumption that the testator destroyed his will with intent to revoke. However, the finding of fact in this Court that the will was in existence at the time of the decedent's death or was fraudulently destroyed during his lifetime destroys the basis upon which the presumption depends. Consequently, unless the order on reversal sets forth the facts found by this Court showing that the will was in existence at the time of decedent's death or was fraudulently destroyed during his lifetime, the Court of Appeals will presume that the reversal was upon questions of law only.

Resettlement is therefore asked so that if the Court of Appeals deems fit to sustain the presumption of destruction animo revocandi urged by the contestant in this Court and in the court below, it would need to do so only after reviewing the facts and reversing the findings of fact made in this Court, instead of presuming that this Court agreed with the Surrogate that the will could not be found at the time of the testator's death.

An appeal has now been taken to the Court of Appeals from the order of reversal herein by notice of appeal dated September 18, 1945 and served September 19, 1945. It is accordingly requested that the said order be resettled nunc pro tunc without prejudice to any of the proceedings taken thereafter.

*Exhibit B.*

WHEREFORE, deponent prays that said order of reversal be resettled accordingly.

LAWRENCE S. TIMEN.

Sworn to before me this
27 day of September, 1945.

EMIL H. WASSERBERGER,
Comm. Deeds, New York City.
Term Exp. 4/18/46.

## Exhibit C.

SURROGATE'S COURT

NEW YORK COUNTY

In the Matter of the Application for Letters of Administration on the Goods, Chattels and Credits of

HENRY ALTMAYER,

Deceased.

In the Matter of Proving the Last Wi and Testament of

HENRY ALTMAYER,

Deceased,

As a Will of Real and Personal Property.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JAMES N. VAUGHAN, being duly sworn, deposes and says:

On September 11, 1945 a conference was had at the Chambers of Surrogate Delehanty in the above matter. In course of that conference we requested $2,000 from the estate in behalf of my client who regardless of the outcome of the appeal then contemplated was the main owner of the funds formerly of her father. Mr. Timen was willing unconditionally to consent that this money should be paid my client. When he spoke with Mr. Wasserberger about it in my presence Mr. Wasserberger immediately raised the question of Mr. Timen's authority as his lawyer to give such consent. He endeavored to ground his consent on an express understanding that he (Mr. Wasserberger) should have commissions on the

money on the assumption that he would prevail in the Court of Appeals. To this proposal I was unwilling to assent on the ground stated by me that a contract affecting commissions would be illegal. Mr. Wasserberger insisted that at any rate the payments to Mrs. Rodney should be without prejudice to his rights regarding commissions on the sum. To this I agreed and Mr. Timen reported the nature of the understanding to the Surrogate.

JAMES N. VAUGHAN.

Sworn to before me this
1st day of March, 1946.

JESSE L. NAPOLETANO,
Notary Public,
Bronx County.
Bronx Co. Clk's No. 27, Reg. No. 69-N-7.
New York Co. Clk's No. 251, Reg. No. 210-N-7.
Kings Co. Clk's No. 21, Reg. No. 161-N-7.
Queens Co. Clk's No. 2164, Reg. No. 112-N-7.
Commission Expires March 30, 1947.

IN THE

# Supreme Court of the United States

OCTOBER TERM 1946 No. 372

In the Matter of Proving the Last Will and Testament of HENRY ALTMAYER,

Deceased,

as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,

Petitioner,

*v.*

BEATRICE ALTMAYER RODNEY,

Respondent,

*and*

DONALD T. MULLANE,

Special Guardian.

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### SUMMARY OF ARGUMENT.

I.

**Essentials decisive of present application for writ of certiorari and requiring denial thereof.**

II.

No constitutional questions were passed on below in the course of a "rehearing".

III.

Detailed demonstration that there was absolute procedural and substantive regularity in all courts below.

IV.

Answers to certain particulars in Mr. Wasserberger's present claims.

V.

Mr. Wasserberger by his own act set up the order of the Appellate Division so that it might be reviewed on the facts precisely as happened in the Court of Appeals.

VI.

Mr. Wasserberger expressly, in terms, anticipated the very action taken by the highest Court of Appeals in making its final judgment.

VII.

The "facts" of Mr. Wasserberger are not facts; and even the actual evidentiary facts leading to the result below are presently immaterial.

VIII.

Collateral facts warrant a direction by this Court that the respondent should be allowed double costs.

IX.

Conclusion.

## POINT I

**Essentials decisive of present application for writ of certiorari and requiring denial thereof.**

Stated succinctly this is what happened. Mr. Wasserberger offered for probate in New York County a conformed copy of a will made by deceased in 1937. The original will he claimed was fraudulently destroyed (fol. 24). Mrs. Rodney answering the claims of Wasserberger contended (1) that probate should be denied because the paper propounded was not an original will; (2) that probate should be denied because the original had been revoked; and (3) that probate should be denied because of the non-occurrence of those facts and circumstances which Wasserberger set forth in his petition as making out his case of fraudulent destruction (fols. 70-72).

The issues were tried by a Surrogate. He denied probate stating that the presumption of destruction *animo revocandi* attached to the 1937 instrument by reason of its non-production since the original had been delivered to the deceased (fol. 811). On all the facts the Surrogate concluded that Mr. Wasserberger as proponent had "* * * failed to carry the burden which was upon him to establish the indispensable fact of destruction in fraud on deceased * * *" (fol. 813).

The Appellate Division of the Supreme Court reversed. It made new findings of fact (fols. 845-6).

The Court of Appeals unanimously reversed the order of the Appellate Division and affirmed the Surrogate's decree on the ground that the Surrogate's findings were in accordance with the weight of the evidence (Record p. 359).

At no time prior to the final determination by the Court of Appeals was any constitutional or Federal question presented or suggested by anybody.

The attempt to assert alleged rights arising under the Fourteenth Amendment was made by Mr. Wasserberger via a motion for reargument and to amend the remittitur. The motion was denied with the following memorandum (295 N. Y. 894):

> "Motion by respondent Emil H. Wasserberger for reargument and to amend the remittitur denied, with $10 costs and the necessary printing disbursements. (See 295 N. Y. 693.)"

On the basis of well established authority, the facts in the case, as briefly outlined above, require denial of the present petition for a writ of certiorari.

*Fullerton* v. *Texas,* 196 U. S. 192;
*McMillen* v. *Ferrum Mining Co.,* 197 U. S. 343;
*Corkran Oil & Development Co.* v. *Arnaudet,* 199 U. S. 182;
*McCorquodale* v. *State of Texas,* 211 U. S. 432;
*Forbes* v. *State Council of Virginia,* 216 U. S. 396;
*Consolidated Turnpike Company* v. *The Norfolk, etc. Ry. Co.,* 228 U. S. 326;
*St. Louis & San Francisco R. R. Co.* v. *Shepherd,* 240 U. S. 240;
*American Surety Co.* v. *Baldwin,* 287 U. S. 156;
*Helis* v. *Ward,* 308 U. S. 365.

## POINT II

**No constitutional questions were passed on below in the course of a "rehearing".**

The petitioner says that:

> "An order on rehearing denied petitioner's motion for reargument and to amend the remittitur to recite constitutional questions raised" (Petition p. 1).

On page 10 of petitioner's brief he identifies the word "rehearing" as a synonym for the word "reargument".

There was no rehearing. There was no reargument. There was simply a motion for reargument which the Court of Appeals denied with costs. The effort of petitioner (if he is making the effort) to suggest that he was afforded a "rehearing" may find its explanation in the fact that had the Court of Appeals passed on the alleged constitutional questions when it received the motion for reargument the United States Supreme Court might have gained jurisdiction to review such action. This point is adequately shown by the following language in *Fullerton* v. *Texas* (*supra*) (p. 193):

> "We have repeatedly ruled that it is too late to raise a Federal question by a petition for rehearing in the Supreme Court of a State after that Court has pronounced its final decision, although if the State Court entertains the petition and disposes of the Federal questions, that will be sufficient. *Mallett* v. *North Carolina,* 181 U. S. 589. In that case it was observed: 'Had that Court declined to pass upon the Federal question and dismissed the petition without considering them, we certainly would not undertake to revise their action'."

The Court of Appeals in the present case did not pass on any Federal or constitutional questions. It simply denied a motion for reargument.

## POINT III

**Detailed demonstration that there was absolute procedural and substantive regularity in all courts below.**

Petitioner confuses the issue, the holding and the opinions in the courts below. The sole issue was whether a copy of a 1937 will of deceased was entitled to probate,

The ultimate holding was that such copy was not entitled to probate.

The opinion of the Surrogate who tried the case and his findings of fact differed from the opinion of the intermediate appellate court and its findings of fact. The Court of Appeals indicated briefly that it agreed (unanimously) with the views of the Surrogate.

What happened below is seriously distorted by the petition now made for a writ.

To set the matter straight some detail, with accurate references to the record, is necessary.

**(a) Proceedings in Surrogate's Court:**

The proceeding began with a petition by Mr. Wasserberger for probate of a copy of a will concededly executed by deceased about seven years before his death. Mr. Wasserberger alleged that the original will "has been lost or destroyed, by accident or design, and that the said Will was in existence at the time of deceased's death, or was fraudulently destroyed in his lifetime, * * *" (fol. 24).

In addition to denial of the material allegations in Wasserberger's petition Mrs. Rodney by her answer pleaded (a) that the paper tendered for probate could not be probated because "it is not an original will"; and (b) that the paper in question had been "duly revoked" in the lifetime of deceased. She did not by her pleadings specify any theory of revocation (fol. 71).

The Surrogate not only formulated the nature of the question he had to try but in fact Mr. Wasserberger's lawyer agreed to the correctness of the Surrogate's views on this point. The Surrogate early in the trial said (fol. 125):

> "All I am concerned with from this point on is the question whether or not a fraudulent destruction

of the will was accomplished, either before or after death."

Mr. Wasserberger did not then through his lawyer criticize this notion. A moment later the Surrogate said (fol. 130):

"The only thing I have in mind as the presently triable issue is the one of fraudulent destruction."

Whereupon Mr. Wasserberger's lawyer said:

"Correct, Judge * * *."

At the end of Mr. Wasserberger's *prima facie* case in favor of probate, the Surrogate was presented by Mrs. Rodney with a motion to dismiss placed squarely on the rule of law in New York (*Matter of Staiger,* 243 N. Y. 468), that an unproduced original will delivered to the testator's possession is presumed to have been duly revoked by him in the absence of affirmative proof to the contrary (fols. 451-452). This motion led the Surrogate to say (fols. 453-454):

"* * * the question is whether or not you (Mr. Wasserberger—proponent) have shown anything that will reverse the presumption that the will, not being found, was destroyed by the testator with intention to revoke."

The long statement then made by Mr. Wasserberger's lawyer did not in the slightest degree question the correctness of the Surrogate's view as to the *question* he had to decide in order to determine the *issue* before him, to wit: whether the copy of the 1937 will should be probated.

Finally, the dependence of the contestant on the rule of law in New York formulated by *Matter of Staiger*

(*supra*) was at no point abandoned for we find Mrs. Rodney at the very end of the trial renewing her motion predicated on that rule of law (fols. 771-772).

The opinion of the Surrogate when delivered contains substantially two holdings: First that "the presumption of destruction *animo revocandi* attaches to the instrument of 1937 by reason of its non-production since the original was delivered to deceased" (fol. 811). Second that

> "The Court holds that the proponent has failed to carry the burden which was upon him to establish the indispensable fact of destruction in fraud on deceased and accordingly denies the prayer of the petition for probate of the copy" (fol. 813).

The decree, which is the holding of the Surrogate's Court, recites that that Court had duly taken proof "among other things as to the existence of the original of said will at the time of the testator's death, and as to the alleged fraudulent destruction of said will during the lifetime of the testator" (fols. 15-16). The decree then orders, adjudges and decrees that the copy of the 1937 will "be and the same hereby is rejected and denied probate" (fol. 16). There never was any constitutional question raised on the trial. Mr. Wasserberger did not then claim he lacked "notice" of Mrs. Rodney's position. He did not claim he had been denied "fair play". And he did not claim that the decree the Surrogate made contained holdings inconsistent with the pleadings.

**(b) Appeal to Appellate Division:**

If Mr. Wasserberger at any time had had some constitutional rights within the meaning of subdivision (b) of Section 344 of Title 28 of the United States Code (Judicial Code Sec. 237, amended), rights which he might "spe-

cially set up" it was at this stage of the proceeding that his opportunity specially to set them up existed. He might then have noticed his appeal on such alleged grounds. But he did not do so. The text of his notice of appeal indicates that he "appeals from so much of said order and decree as rejects and denies probate of the instrument dated May 1st, 1937, propounded as a copy of the Last Will and Testament of Henry Altmayer, deceased" (fol. 9).

The jurisdiction of the Appellate Division of the Supreme Court on an appeal from a decree of the Surrogate's Court enables that Court to take in new facts (Sec. 309 Surrogate's Court Act). It did so in the proceeding at the instance of Mr. Wasserberger. Such facts did not alter the essential shape of the proof as it came before the Surrogate.

The Appellate Division explicitly reversed the fact findings of the Surrogate; and made its own new findings of fact as appears from its resettled order (fols. 844-847) which became the subject matter of Mrs. Rodney's appeal to the Court of Appeals (fols. 831-832). It is noteworthy that the Appellate Division's order is in substance an express holding that Mr. Wasserberger did do what the Surrogate said he had not done. That Court held that Mr. Wasserberger established by his proof either that the original will existed when testator died or that it had been fraudulently destroyed in deceased's lifetime (fol. 847). It expressly disapproved the fact findings of the Surrogate and enumerated such disapproved findings (fol. 845).

It should here be borne in mind that it was Mr. Wasserberger who prepared the order (fol. 838). It therefore expresses his view of what the Appellate Division decided. (See affidavit of James N. Vaughan prefixed to this brief.)

**(c) Appeal to Court of Appeals:**

The appeal to the Court of Appeals was duly taken by Mrs. Rodney from "each and every part" of the Appellate Division's resettled order (fol. 832). This appeal was of right (Civil Practice Act, Sec. 588). Since the Appellate Division on reversing the Surrogate's Court had found new facts, the jurisdiction of the Court of Appeals extended to review of both the facts and law (Art. 6, Sec. 7, Constitution of the State of New York; Sec. 602, Civil Practice Act).

The Court of Appeals had for decision sharply controverted questions of fact. The Surrogate's fact findings had been specifically rejected by the Appellate Division which made its own findings of fact. In this situation the highest court decided "that the findings of the Surrogate are in accordance with the weight of the evidence" and that "* * * it is considered that the said order (appealed from) be reversed and decree of Surrogate's Court affirmed with costs in this Court and in the Appellate Division" (Record p. 359).

Of course, there were many law questions argued to the Court of Appeals not only by Mr. Wasserberger but also by Mrs. Rodney. But the cause simmered down to the fact question and that Court saw the facts and the controlling law as the Surrogate saw them. So viewing the facts and law, the Court of Appeals could and did briefly determine for reversal.

**(d) Summary respecting the proceeding below:**

Regularity features the proceedings below at every stage thereof. The issue was one of probate or non-probate of a copy of a will. It turned on the question whether the original instrument, which was unproduced, had been fraudulently destroyed. On this subject the burden of proof rested with the proponent. The Surro-

gate held he failed to carry this burden. The Appellate Division held he did. The Court of Appeals held he did not.

The nature of the law question to be decided was formulated by the Surrogate at the trial. It was never denounced by Mr. Wasserberger as amounting to a denial to him of due process or of equal protection of the laws. Indeed Mr. Wasserberger assented at the trial to its correctness. No constitutional claims were made by Mr. Wasserberger on the later appeals. It was only after he had been defeated in the highest court of the State after a full hearing on briefs and argument that he contrived his present theory of denial of due process and of equal protection of the laws.

## POINT IV

**Answers to certain particulars in Mr. Wasserberger's present claims.**

Assuming for discussion only that by way of a motion for reargument of a finished case a constitutional question might be injected into the cause though it was never theretofore asserted, some consideration may be given Mr. Wasserberger's claims on their merits.

First he says he was denied due process of law. He puts it this way (Petition p. 2):

> "The federal question involves a denial of due process of law in giving judgment on a defense other than that pleaded and proved. The relief granted contestant was not within the grounds relied on by her to obtain it."

Mr. Wasserberger here inverts what happened. There was not so much a grant of relief to contestant as there was a denial of relief to the petitioner. Mr. Wasser-

berger failed to sustain the burden of proving a fraudulent destruction of the original will. He had that burden at all times. The Surrogate said so repeatedly not only with no dissent by Mr. Wasserberger during the trial but with his express assent through his lawyer to the correctness of this view (fol. 130).

If it may be said that Mrs. Rodney was "granted relief" it is nevertheless not true to say she received it on grounds distinct from grounds on which she relied. This can be demonstrated. In her answer asking denial of probate to the copy of the will she alleged (fol. 70):

> "First: That the paper propounded for probate herein, is invalid as a Last Will and Testament of Henry Altmayer, deceased, and is illegal and void in that it is not an original will."

The ultimate decision is plainly consistent with that allegation. The propounded paper was not an original instrument. The original was delivered into custody of deceased. It therefore had to be denied probate unless its fraudulent destruction were proved by Mr. Wasserberger.

The answer of Mrs. Rodney also has this allegation (fol. 71):

> "Second: That the said paper is not the Last Will and Testament of decedent, in that it was during his lifetime duly revoked by him" (fol. 71).

This allegation is consistent with any kind of revocation including revocation presumed to have happened because the original will was not produced and its fraudulent destruction was not proved.

Mr. Wasserberger also says that "No notice was ever given of any claim that after a search the will could not be found" (Petition p. 3). This statement is untrue.

Such notice is contained in Mr. Wasserberger's Exhibit 7 (fols. 796-800). It is also in the Petition of Mrs. Rodney for letters of administration put before the Appellate Division by Mr. Wasserberger himself (fols. 848-854). It is also the fact that the safe deposit box of deceased was searched for a will in Mr. Wasserberger's presence and no will was found. (Incidentally Mr. Wasserberger never conceded the paper was not in the box although the representative of the State Tax Commission said such was the fact.) (fols. 223-224). Moreover the theory of the probate proceeding was that a copy was offered in lieu of the original will because the original could not be found (fol. 24).

Mr. Wasserberger explains the second alleged federal question as follows (p. 4):

> "The second federal question, involving equality of treatment under the equal protection clause of the 14th amendment, arises out of the refusal of the court below * * * to decide the question of law as to revocation presented upon the appeal * * *".

What the Court of Appeals did was to reverse the order of the Appellate Division and to approve the decree of the Surrogate's Court. If it failed to decide what Mr. Wasserberger calls "the question of law as to revocation" then so too did the Surrogate in the first instance. But this constitutional ground of appeal if it ever existed was not asserted at any time by Mr. Wasserberger until his definitive defeat in the Court of Appeals.

Moreover the Court of Appeals was not presented with a "question of law as to revocation". It was presented with an appeal to it taken by Mrs. Rodney from "each and every part" of the resettled order of the Appellate Division,—a very different thing indeed. It was an appeal to the Court of Appeals to exercise its constitutional power to review facts and to overturn the fact findings

of the Appellate Division. That Court's problem was to review the whole record in the light of the character of the appeal.

Mr. Wasserberger speaking apparently of both alleged constitutional questions and attempting to explain why he never raised them until after losing in the Court of Appeals says:

> "The federal question arose from the unanticipated disposition of the case at the close of proceedings upon the appeal in the Court of Appeals."

Unanticipated by whom? The disposition made of the case by the Court of Appeals was the hoped for outcome which actuated Mrs. Rodney when she appealed for justice to that Court. (And see Point VI below where is shown proof that Wasserberger in terms anticipated what in fact happened in the Court of Appeals.)

## POINT V

**Mr. Wasserberger by his own act set up the order of the Appellate Division so that it might be reviewed on the facts precisely as happened in the Court of Appeals.**

It is odd to find Mr. Wasserberger claiming that the Court of Appeals had no right to reverse on the facts. It was he who insisted on a resettled order by the Appellate Division which contained express holdings of fact by that Court thereby making it unnecessary for the Court of Appeals to confine its review to questions of law on the theory that the Appellate Division had affirmed the holding of fact by the Court of original jurisdiction (see § 602 Civil Practice Act). The original order made by the Appellate Division (see Exhibit A to the prefixed annexed affidavit of James N. Vaughan) had merely reversed "upon questions of fact and law" with-

out stipulating what new facts it had found. In case of an appeal from an order in that form the Court of Appeals may, but will not necessarily, send the case back to the Appellate Division that the latter Court may amend its order to show its new fact findings (*Hart* v. *Blabey*, 287 N. Y. 257). When the facts newly found are, however, shown in the order of the Appellate Division reversing the Court of original jurisdiction on the facts then, under the State Constitution and Civil Practice Act, the Court of Appeals indubitably has the power to review the facts found by the intermediate Court and in a suitable case, such as the present case, to reverse them. It has acted thus in other cases, of course. For example see *Aerated Products Co.* v. *Godfrey*, 290 N. Y. 92, 95 and *Pocket Books, Inc.* v. *Meyers*, 292 N. Y. 58, 61.

Mrs. Rodney first appealed to the Court of Appeals, from the order of the Appellate Division in its original form. Strategically her position as appellant, looked at prospectively, would have been better on an appeal from an order in that form than from an order whereby the Appellate Division made express fact findings. In the former alternative she would have had the benefit of a presumption that the reversal by the Appellate Division had been made solely on questions of law. She, therefore, opposed the making of the resettled order. Nevertheless a resettled order was made and it became the subject matter of the appeal to the Court of Appeals.

## POINT VI

**Mr. Wasserberger expressly, in terms, anticipated the very action taken by the highest Court of Appeals in making its final judgment.**

Independently of everything heretofore stated in this brief it chances that in this case the non-existence of Mr. Wasserberger's alleged right to a writ can be shown out of his own mouth. Basically he now claims that Mrs.

Rodney was granted relief "not within the grounds relied on by her to obtain it and which was not responsive to the issue tendered and heard" (Brief p. 18). For this reason he says he was denied "due process". And he was denied "equal protection of the laws" he says because the Court of Appeals did not decide "the question of law as to revocation presented upon the appeal" (Petition p. 4).

That both of his claims are unsound the objective facts demonstrate.

But what is more he makes his present petition knowing they are unsound. He knows that Mrs. Rodney did rely on the presumption of revocation of the original Will in the absence of proof of fraudulent destruction and that she relied on it in every Court below. That Mr. Wasserberger had that knowledge appears from the affidavit made by his lawyer, Mr. Timen, under date 27 September 1945 and sworn to by Mr. Timen before Mr. Wasserberger himself, the latter acting in his quality of a Commissioner of Deeds in New York City.

The affidavit in question was made by Mr. Timen to support a motion in the Appellate Division to resettle the order of reversal made by that Court. The full text of that affidavit is submitted as Exhibit B to the prefixed affidavit of James N. Vaughan. Mr. Timen opens his affidavit by showing that reversal was put by the Appellate Division on both facts and law; that the facts found by the Surrogate materially differed from the facts found by the Appellate Division; that under the last sentence of § 602 Civil Practice Act unless the Appellate Division by its order stipulated the facts reversed and the new facts found the Court of Appeals would presume the reversal was made solely on the law; and that this would be prejudicial to Mr. Wasserberger. Then he says:

> "This is particularly significant in view of the fact that the contestant (i. e., Mrs. Rodney who is the

> respondent in regard to the present petition for a writ of certiorari) urged a proposition of law in the Court below (i. e., the Surrogate's Court) and in this Court (i. e., the Appellate Division of the Supreme Court) that by reason of the nonproduction of the will by proponent there arises a presumption that the testator destroyed his will with intent to revoke.
> • • •
>
> "Resettlement is therefore asked so that if the Court of Appeals deems fit to sustain the presumption animo revocandi urged by the contestant in this court and in the court below, it would need to do so only after reviewing the facts and reversing the findings of fact made in this court, instead of presuming that the court agreed with the Surrogate that the will could not be found at the time of the testator's death."

The action taken unanimously by the Court of Appeals thus exactly answers to the specifications set forth in advance by Mr. Wasserberger himself (through his lawyer).

## POINT VII

**The "facts" of Mr. Wasserberger are not facts; and even the actual evidentiary facts leading to the result below are presently immaterial.**

The "Facts" according to Mr. Wasserberger (Petition pp. 7-10) are not the genuine evidentiary facts. They are Mr. Wasserberger's version of the evidentiary facts. Mrs. Rodney's testimony on material facts differed radically from that of her ex-lawyer Mr. Wasserberger. All evidentiary facts for present purposes are immaterial. For present purposes it is material to know only the facts concerning the actions of the various Courts below which shed light (1) on the question whether due process

or equal protection of law were accorded Mr. Wasserberger and (2) on the preliminary question whether he has any standing to raise constitutional issues after final judgment by the highest Court of New York State.

## POINT VIII

### Collateral facts warrant a direction by this Court that the respondent should be allowed double costs.

There are some collateral facts which should be shown as a guide to the Court in conjunction with respondent's application to this Court to award her double costs as provided by Subdivision (c) of § 344, Title 28, United States Code (Judicial Code, § 237, amended) read in conjunction with §878 thereof. Such double costs should be granted apparently where there appears "* * * to be no reasonable ground for granting a petition for certiorari; * * *"

Mr. Wasserberger is the former lawyer of Mrs. Rodney (fols. 118; 206; 150; 209; 211; 317; Proponent's Exhibit 3). His testimony of her statements to him (denied by her in all material respects) is testimony of statements she is alleged to have made in his office and while standing in the lawyer-client relationship. All such alleged statements were drawn out by Mr. Wasserberger according to his own version of what Mrs. Rodney said to him (fols. 166-168; 171-172; 176-177; 188). Nothing was volunteered by her,—according to Mr. Wasserberger himself. (On this aspect of the matter consider Section 353 Civil Practice Act.)

Mr. Wasserberger in this litigation apart from his own personal interests in getting commissions as a fiduciary and fees as a lawyer represented interests aggregating $4,000; and even that interest in $4,000 was pro forma because the two general legatees under the propounded paper distinct from Mrs. Rodney and her daughter Nanette

had notice of the probate contest (fol. 92) but never appeared in the proceeding. In substance only Mrs. Rodney and her daughter would have taken really important benefits under the alleged Will. Mrs. Rodney contested the Will by her own counsel. The infant daughter was represented separately by her Special Guardian. After the decision by the Surrogate's Court it was Mr. Wasserberger theoretically representing interests aggregating $4,000 (apart from his personal financial hopes) who alone appealed to the Appellate Division. The Special Guardian did not appeal.

That Mr. Wasserberger at all times was concerned deeply with getting the maximum amount of money he could from this estate was revealed by a trifling incident. During the interval between reversal by the Appellate Division and reversal of that Court by the Court of Appeals, Mrs. Rodney wanted the small sum of $2,000 on account of her share in the estate. Mr. Wasserberger tried to condition his consent to payment of the sum on an agreement that he should have his executorial commissions computed on it. (See Exhibit C attached to the prefixed affidavit of James N. Vaughan.)

When the Court of Appeals reversed the Appellate Division it became appropriate for the Surrogate's Court to make its order and decree on remittitur. In connection therewith Mr. Wasserberger applied for an allowance for legal services in the Appellate Division and in the Court of Appeals. What he wanted was $25,000. He was allowed $2,500. The Special Guardian was allowed $750. Mr. Wasserberger was also awarded costs and disbursements of $465.24 and has accepted payment of that amount. Dissatisfied with his counsel fee of $2,500 he appealed to the Appellate Division. His appeal to that Court was taken solely from so much thereof as grants him $2,500 "for his expenses for counsel on both such appeals." This appeal had been boticed for argument on September 27, 1946.

It is submitted that the foregoing collateral facts taken in conjunction with the other matters hereinabove set forth justify the conclusion that in denying the present petition for a writ of certiorari double costs should be awarded the respondent.

## POINT IX

### Conclusion.

The petition for the writ of certiorari should be denied

(a) Because constitutional questions were not injected into the cause until after final judgment by the highest Court of New York State and that Court at no time passed on any Federal or constitutional question:

(b) Because the action of the highest Court of New York State was strictly in accordance with its power as defined by the Constitution of New York State;

(c) Because the actual decision of the highest Court of New York State not only was within its jurisdiction and power but was explicitly anticipated as a possibility by Mr. Wasserberger himself;

And in denying the present petition this Court should exercise its power to award double costs to respondent on the ground that there is no reasonable basis for granting the writ and the petitioner had knowledge of that fact before he made this application.

Respectfully submitted,

VAUGHAN AND LYONS,
Attorneys for Respondent.

JAMES N. VAUGHAN,
of Counsel.

## Appendix

Title 28, United States Code, § 344 (b) (Judicial Code § 237 (b):

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

§ 344 (c):

"(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for

dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: Provided, That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title."

§ 878:

"Damages and costs on affirmance. Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court of appeals, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

Surrogate's Court Act, § 309:

"Power of Appellate Court: Further Testimony. Where an appeal is taken upon the facts, the Appellate Court has the same power to decide the questions of fact, which the Surrogate had; and it may, in its discretion, receive further testimony or documentary evidence and appoint a referee."

New York Civil Practice Act, § 353; § 588; § 602.

"§ 353. Attorneys and their employees not to disclose communications. An attorney or counsellor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor

shall any clerk, stenographer or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon."

"§ 588. Appeal as of right. Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, which action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency; and provided further that,

(c) the appellate division direct a reversal or modification of the judgment or order appealed from;

"§ 602. Order of appellate division to specify grounds upon reversal or modification; presumption otherwise made. Whenever the appellate division reverses or modifies or sets aside a determination and thereupon renders a final or interlocutory judgment or order, except where it reinstates a verdict, its order shall state whether its determination is upon the law, or upon the facts, or upon the law and the facts.

1. If the determination is stated to be upon the law alone, the order shall also state whether or not the findings of fact below have been affirmed; and

2. If the determination is stated to be upon the facts, or upon the law and the facts, the order shall also

(a) specify the findings of fact which are reversed or modified, and

(b) set forth any new findings of fact made by the appellate division with such particularity as was employed for the statement of the findings of fact in the court of original instance; except that

(c) the order need not specify the findings of fact which are reversed or modified nor set forth any new findings of fact if the appeal is either from a determination duly rendered by the court without any statement of the findings of fact or from a judgment entered upon a general verdict without special findings.

If the order of the appellate division does not comply with the requirements of this section, the court of appeals shall presume that the questions of fact were not considered by the appellate division."

New York State Constitution, Article 6, § 7:

"§ 7. (Jurisdiction of court of appeals.) The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; * * *"

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IN THE

# Supreme Court of the United States

**October Term, 1946 — No. 372**

In the Matter of Proving the Last Will and Testament of
HENRY ALTMAYER, Deceased,
as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,
*Petitioner,*

*vs.*

BEATRICE ALTMAYER RODNEY,
*Respondent,*

and

DONALD T. MULLANE,
*Special Guardian.*

## SPECIAL GUARDIAN'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK

DONALD T. MULLANE
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## SPECIAL GUARDIAN'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Donald T. Mullane, Special Guardian of Nanette Barbara Rodney, a person interested herein but under the laws of the State of New York not a distributee of the above named decedent, respectfully shows to this Honorable Court as and for his reply to the Petition for

Writ of Certiorari to the Surrogate Court, New York County, State of New York.

1. That he was duly appointed the Special Guardian of Nanette Barbara Rodney by the Surrogate's Court of the County of New York, State of New York. (Record page 28).

2. There is submitted herewith to this Court an analysis of the record in the hope that it may be helpful to this Court in deciding the petition now pending before this Honorable Court for a Writ of Certiorari to the Surrogate's Court, New York County, State of New York.

## ANALYSIS OF RECORD

### The Parties and Their Interests

Emil H. Wasserberger, the petitioner here, is a co-executor named in the propounded instrument (fol. 60). He is the attorney who drew the instrument and who supervised its execution (fols. 778, 124-125). He is not named as a legatee in the Will.

The respondent here, Beatrice Altmayer Rodney, is the only daughter of the deceased (fol. 315). In the Will she is named as the principal legatee (fols. 57-58). The decedent died a widower, and in case of intestacy she is the sole distributee (fols. 756-768).

The Special Guardian appears on behalf of Nanette Barbara Rodney, the only grandchild of the decedent, the daughter of the objectant, Beatrice Altmayer Rodney (fol. 316). In the Will a trust fund of approximately one-third of the estate was created for her benefit (fols. 50-53). In the event of intestacy, she will receive nothing.

The value of the estate at the time of decedent's death was placed at approximately Two Hundred Thousand Dollars ($200,000.00) (fol. 45).

## The Instrument Propounded

The propounded document is a carbon copy of an original (fol. 24).

Its documentary scheme is as follows:

Beatrice Altmayer Rodney, the decedent's daughter, is the principal legatee, receiving outright approximately two-thirds of the Estate (fols. 57-58). Nanette Barbara Rodney, the decedent's only granddaughter, is the beneficiary of a trust fund of approximately one-third of the estate, which trust fund is to continue until she attains the age of twenty-eight, at which time the remaining principal will be paid to her outright, but in the event of her earlier death the principal is to go to her mother (fol. 52). Rose Stern, a niece of the decedent, is the beneficiary of a bequest of Two Thousand Dollars ($2,000.00), as is the Federation for the Support of Jewish Philanthropic Societies of New York City (fols. 49-50).

## The Pleadings

Emil H. Wasserberger, the proponent below and petitioner here, offered a carbon copy of a Will dated May 1, 1937, alleging that the original was in existence at the time of the death of the deceased, or was fraudulently destroyed during his lifetime (fols. 22-23, 34).

Beatrice Altmayer Rodney, the objectant below and respondent here, answered, denying those paragraphs of the petition that related to the continued existence of the Will and its fraudulent destruction, and alleged that the instrument was revoked by the decedent during his lifetime (fols. 70, 71).

## Facts

The deceased executed a Will on May 1, 1937 (fols. 778-779). The Will was drawn by the petitioner here, Emil Wasserberger, who also supervised its execution by the deceased in the presence of the subscribing witnesses and the respondent here, at Mr. Wasserberger's office (fols. 125-126). The Will was on that date delivered to the decedent, who, in the presence of witnesses, stated that he would deposit the Will in his safe deposit box (fols. 132; 277-278). Thereafter, the decedent stated that he had deposited the Will in the box (fol. 133).

The decedent, at that time and up to the time of his death, had a safe deposit box in the Manufacturers Trust Company. The decedent and the objectant each had access to the box. The decedent was bedridden from sometime in October, 1943 to his death on February 1, 1944 (fols. 780-781; 336-338; 403-404). During this period the objectant was the only one who had access to the box (fols. 348, 781), and she actually did visit it during this latter period (fol. 345).

The petitioner here testified that in March of 1940, he reviewed the Will, and that he discussed with respondent here the fact that through oversight the Will, as prepared, did not provide that the Trustees would not be required to furnish security. He advised her that he thought this should be remedied, and suggested a codicil to the Will to take care of this. He prepared a draft and sent it to her, as requested, but never received any reply from her (fols. 146-153).

The petitioner here testified that on January 6, 1944 the respondent here told him that she had seen the Will in the safe deposit box that morning, but that she had not had a chance to read it and asked if the proponent had a copy. He showed her the conformed copy offered for probate, which she read without comment (fols. 171-174).

Emil H. Wasserberger, the petitioner here, also testified that he saw the respondent here about three or four days later, at which time she asked if a copy of the Will could be probated if the original was not produced; and he advised her that he believed it could if there were no objections. He inquired of her why she asked, to which Beatrice Altmayer Rodney replied that the Will was "entirely outmoded." When asked by him at this point if the Will was not in the safe deposit box, she replied, "I don't know. I don't know. I will have to see" (fols. 177-179).

He further testified that he saw her again on January 21, 1944 (fols. 180-182), and called her on the telephone on February 1, 1944 (fols. 183-185), the evening of her father's death; that he saw her at the funeral parlor on February 2, 1944, at which time he told her that it was time for him to prepare some papers, to which she replied:

> "I will come to your office in a few days to discuss matters with you and get things straightened out, but for the present I have the funeral on my hands" (fols. 185-186).

Finally, he testified, that not hearing from the objectant for about a week he tried to reach her by telephone at home and at her father's place of business, without success, leaving messages at each place asking that she get in touch with him; that she failed to do so; that he finally reached her by telephone on February 10, 1944, at which time he told her that he was preparing a petition for probate and a petition for an order to open the deceased's safe deposit box, in order to get the Will, and that he needed certain information. She gave him part of the information, and then asked him why he wanted it, to which he replied:

> "Well, as I just explained to you, I have to get an order to open the vault in order to take out the will.";

at which point she advised him:

> "The Will is not in the box. The man died intestate" (fols. 187-190).

Part of respondent Beatrice Altmayer Rodney's deposition was read into the record. She also testified in her own behalf. She admits that she examined the contents of the safe deposit box between the latter part of October, 1943 and the first of February, 1944 (fol. 350). She admits having had a conversation with proponent at his office in January, 1944, at which time they discussed her father's Will. Her version of the conversation was as follows:

> "Mr. Wasserberger said, 'Rod, I suppose this Will—you have access to your father's safety deposit box. I suppose the Will is in the box,' and I answered, 'Ask me no questions and I will tell you no lies.' Whereupon, Mr. Wasserberger reached down in the desk drawer and produced a copy of the Will, laid it on his desk, and said, 'Well, Rod, shall we offer this for probate, although the Court does not look with favor upon it?' And I answered, 'My father is still pretty much alive'" (fols. 362-363; see also fols. 663-664).

She denied having any further conversation with proponent at his office concerning the Will, but admits meeting him and having telephone conversations with him immediately prior and subsequent to her father's death. Her version of the telephone conversation between them about ten days after the death of her father is substantially the same as proponent's (fols. 393-395).

Respondent Rodney testified that she consulted another attorney on February 2, 1944, the day after her father's death and before he was buried (fols. 763-764). On February 5, 1944 she signed and verified a petition for probate, in which she stated:

> "That your petitioner has made diligent search and inquiry for a Will of said Deceased and has not found any such Will, nor has your petitioner obtained any information concerning any such Will" (fol. 850).

Objectant (respondent here) produced evidence through the witness, Kelekian, to the effect that the Will had been revoked by the testator in the summer of 1939. The objectant did not testify as to the revocation, because of the limitation of Section 347 of the Civil Practice Act (fols. 332-335), but Kelekian did testify that she was present at the time (fol. 532). She admits, however, that she did not advise the proponent of the destruction of the Will at the time they discussed it in his office in January, 1944, or during any of her subsequent meetings or conversations with him (fols. 442-444).

The Surrogate ignored Kelekian's testimony (fols. 808-813), and the Appellate Division found it,

> "not only highly improbable in itself but wholly inconsistent with and in direct conflict with, the conduct of contestant in the period preceding and immediately following the death of the testator (fol. 1063).

The rest of the testimony adduced at the trial was of little or no value in determining the issues of this case. For example, the proponent petitioner here sought to show a strong bond of affection between the decedent and his granddaughter (fols. 137-138; 249-250), while the objectant respondent Rodney here sought to show that his

feelings toward her were cold and undemonstrative (fols. 462-464); but neither side was able to show any change in his feelings toward her from the time the Will was executed in 1937 to the date it was allegedly revoked in 1939, or to the date of his death in 1944. If his feelings toward her were warm or cold, they were the same throughout and were strong enough to induce him to execute a Will leaving her one-third of a sizable estate (fols. 50-53).

In support of the petition, some proof was presented of declarations of the deceased near the time of his death, to the effect that his affairs were in order and that he had a Will (fols. 196-199; 243-244; 261-262). The Surrogate found these "of doubtful admissibility but in any case were of no probative value" (fol. 811). The Appellate Division apparently ignored this testimony in arriving at its decision (fols. 835-847; 1061-1063).

The Surrogate, "While agreeing with the proponent that the speech and conduct of the daughter leave her open to grave suspicion," decided that he could not

> "find in the proof enough to warrant a finding that the Will was actually in deceased's safe deposit box after a date when deceased became bedridden or a finding that the will was in existence when deceased died or a finding that it had been fraudulently destroyed in deceased's lifetime,"

and therefore denied the petition for probate (fols. 812-813).

The Appellate Division unanimously reversed this decision and found,

(1) That after its execution, decedent's Will dated and duly executed May 1, 1937, was placed in a safe deposit box in the Manufacturers Trust Company, subject to the joint control of the deceased and the contestant;

(2) That this Will remained in this safe deposit box up to at least the early part of January, 1944;

(3) That for several months prior to his death on February 1, 1944, deceased was bedridden, and that after the date when deceased became bedridden the only person who had access to the safe deposit box where the Will had been placed, was the contestant;

(4) That the original of the Will was not destroyed by decedent; that this Will was in existence when decedent died, or had been fraudulently destroyed in deceased's lifetime (fols. 846-847).

Beatrice Altmayer Rodney, respondent herein, then appealed to the Court of Appeals of the State of New York. The Court of Appeals in its decision reversed the order of the Appellate Division and affirmed the decree of the Surrogate's Court of New York County, with costs in the Court of Appeals and in the Appellate Division upon the ground that the findings of the Surrogate are in accordance with the weight of the evidence. (Record page 359).

Emil H. Wasserberger, the petitioner herein, then moved in the Court of Appeals of the State of New York for an order granting re-argument of the appeal herein.

Upon such re-argument, it was argued that the Court of Appeals had denied Emil H. Wasserberger, as respondent, equal protection of the laws of the State of New York; that the Court of Appeals had denied and abridged the rights, privileges and immunities and the due process of law secured to respondent Emil H. Wasserberger, petitioner herein, by Section 1, of the 14th Amendment of the Constitution of the United States, and by Article 1, Sections 1 and 6 of the Constitution of the State of New York; that the Court of Appeals had failed to decide the question of law as to the issue of revocation of the will

which was necessary to the determination of the litigation; that the Court of Appeals failed to discharge its primary duty and function of reviewing the question of law presented upon the appeal.

It was also argued that even though reversal were indicated, a new trial should have been granted.

The Court of Appeals in its decision on said motion, denied the same with costs and necessary disbursements. (Record pages 362-363).

It is from this decision that petitioner herein seeks a Writ of Certiorari from this Court to the Surrogate's Court of New York County, State of New York.

## Special Guardian's Position on this Petition for Writ of Certiorari

The Special Guardian's ward, Nanette Barbara Rodney, at the time of the trial before the Surrogate's Court of New York County, was eighteen years of age. She is now twenty years of age and will be twenty-one years of age on February 28th, 1947.

On the trial before the Surrogate's Court of New York County, against the wishes of the undersigned, Nanette Barbara Rodney took the stand and testified against her own interests in this proceeding and in behalf of her mother, Beatrice Altmayer Rodney, respondent herein (fols. 459-518).

The undersigned Special Guardian felt that a factual issue was raised upon the trial.

In the Surrogate's Court of New York County, State of New York, he urged that the respondent here, Beatrice Altmayer Rodney, had not borne the burden of proving revocation and asked that the copy of the propounded instrument be admitted to probate.

In the face of the determination by the Surrogate's Court of New York County of what in the opinion of the

Special Guardian was purely a factual situation, the Special Guardian did not appeal from the Surrogate's decision denying probate.

On the appeal to the Appellate Division of the Supreme Court of the State of New York, the undersigned as Special Guardian of Nanette Barbara Rodney, submitted an impartial analysis of the testimony in the belief that it might be helpful to that Court in deciding the appeal.

As indicated in the record, and in this reply, the Appellate Division of the Supreme Court of the State of New York reversed the Surrogate's Court and awarded the undersigned as Special Guardian, although he did not appeal, costs. (Record pages 354-355).

In the Court of Appeals of the State of New York the undersigned as Special Guardian, argued and submitted a brief asking that the decision of the Appellate Division be affirmed.

As indicated *supra* the Court of Appeals of the State of New York reversed the order of the Appellate Division and reaffirmed the order of the Surrogate. (Record page 359).

The undersigned Special Guardian has read the brief of Edward B. Wolchok, Esq., attorney for the petitioner herein, submitted in support of the petition for Writ of Certiorari from this Honorable Court. While the undersigned Special Guardian cannot in his own mind see that any constitutional question is involved herein, nevertheless in view of the fact that it would be to his ward's interest to have the propounded document admitted to probate, he does not oppose this petition.

Respectfully submitted,

DONALD T. MULLANE,
Special Guardian for Nanette Barbara Rodney, appearing *pro se*.